Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 4979.

HOPE NATURAL GAS COMPANY, PETITIONER

versus

FEDERAL POWER COMMISSION, CITY OF CLEVELAND, CITY OF AKRON, AND PENNSYLVANIA PUBLIC UTILITY COMMISSION, RESPONDENTS

On Petition for Review of Orders of the Federal Power Commission

July 18, 1942, petition for review filed and cause docketed.

NOTE.—The petition for review is in the words and figures following, to-wit:

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FOR THE FOURTH CIRCUIT.

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Petitioner,

vs.

FEDERAL POWER COMMISSION,
CITY OF CLEVELAND,
CITY OF AKRON, and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

PETITION FOR REVIEW.

To the United States Circuit Court of Appeals for the Fourth Circuit and the Honorable Judges Thereof:

Petitioner, Hope Natural Gas Company, hereinafter referred to as "Hope," being aggrieved by orders issued by respondent the Federal Power Commission, hereinafter referred to as the "Commission," in four proceedings under the Natural Gas Act (52 Stat. at L. 821 (1938), 15 U. S. C. Secs. 717-717w) to which Hope was a party, hereby files in this Honorable Court pursuant to Section 19(b) of said Act (15 U. S. C. Sec. 717r(b)) this its written petition to review said orders, praying that said orders be set aside. These orders, designated "Order Reducing Rates" and "Findings As To Lawfulness Of Past Rates," dated May 26, 1942 and served upon Hope on June 1, 1942, were issued by the Commission in four proceedings before it, all consolidated for hearing, entitled and bearing the Commission's docket numbers as follows:

City of Cleveland, Complainant, v. Hope Natural Gas Company, Defendant, Docket No. G-100;

City of Akron, Complainant, v. Hope Natural Gas Company, Defendant, Docket No. G-101;

In Re: Hope Natural Gas Company, Docket No. G-113;

Pennsylvania Public Utility Commission, Complainant, v. Hope Natural Gas Company, Defendant, Docket No. G-127.

In support of its petition Hope respectfully represents and shows:

(a)

THE NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT.

The orders of the Commission of which review is sought fixed rates to be charged by Hope for its interstate sales of natural gas on and after July 15, 1942 and purported to determine the reasonable rates which Hope should have charged for such sales in the past. The proceedings in which these orders were entered were three complaint proceedings before the Commission and one investigatory proceeding instituted on the Commission's own motion, all involving the reasonableness of Hope's interstate natural gas rates, and hereinafter more particularly described.

Hope is a West Virginia corporation, with all of its properties located within the State of West Virginia. It was organized in 1898 and since that time it has continuously been and is now engaged in the production, purchase, transmission and sale of natural gas. In addition to distributing natural gas to consumers located in numerous West Virginia communities, it sells natural gas at or near the West Virginia state line to five companies which distribute natural gas to consumers located in Ohio and Pennsylvania. These five companies are The East Ohio Gas Company, which serves consumers in the Cities of Cleve-

land and Akron, Ohio, as well as numerous other Ohio communities, The River Gas Company which serves consumers principally in Marietta, Ohio and The Peoples Natural Gas Company, Fayette County Gas Company and The Manufacturers Light and Heat Company which serve consumers located in Pennsylvania. Promptly after passage of the Natural Gas Act in 1938 Hope, recognizing the Commission's jurisdiction over its interstate operations, filed its existing sales contracts with these five companies with the Commission as rate schedules pursuant to Section 4(c) of said Act (15 U. S. C. Sec. 717c(c)).

Respondent the Federal Power Commission is a commission created and established by Act of Congress (41 Stat. at L. 1063 (1920), as amended, 16 U. S. C. Sec. 792). By the Natural Gas Act the Commission is vested with certain regulatory powers over persons engaged in the interstate sale of natural gas, including the regulation of rates.

On July 6, 1938 respondent the City of Cleveland, Ohio, being then engaged in a natural gas rate controversy with The East Ohio Gas Company before The Public Utilities Commission of Ohio, filed a complaint against Hope with the respondent Federal Power Commission alleging, in general terms only, that the price charged by Hope to The East Ohio Gas Company for natural gas was excessive and unreasonable and that the determination of a proper rate would be of assistance to The Public Utilities Commission of Ohio in determining local distribution rates for The East Ohio Gas Company in Cleveland. The prayer of the complaint was for an investigation by the Commission and a finding that the existing rate was excessive and unreasonable and that a fair rate be fixed. This complaint, the first under the Natural Gas Act, was docketed by the Commission as No. G-100. Hope filed its answer denying the general charges in the complaint as to the unreasonableness of its rates and averring that the reasonableness of the Hope

rate to The East Ohio Gas Company had been investigated by The Public Utilities Commission of Ohio as recently as 1937, when it was approved by that Commission, and that it was again under investigation by that Commission.

On July 25, 1938 respondent the City of Akron, Ohio, filed a complaint in all respects similar to that filed by the City of Cleveland and this was docketed by the Commission as No. G-101. Hope filed an answer to this complaint similar to that filed in response to the complaint of the City of Cleveland.

On October 14, 1938 the Commission by order instituted a general investigation of all of Hope's interstate rates to determine whether any of them were unjust, unreasonable or discriminatory and if they were to fix and determine the proper rates. This investigation was docketed by the Commission as No. G-113.

On January 6 and 9, 1939 respondent the City of Cleveland filed an amendment to its original complaint and a petition in proceeding No. G-113 asking that the Commission's order of October 14, 1938 in proceeding No. G-113 be modified to include an investigation as to whether Hope had violated the Natural Gas Act by charging The East Ohio Gas Company an excessive rate since June 21, 1938, the effective date of the Natural Gas Act, and praying for a finding that the Natural Gas Act had been so violated. Hope filed answers to this amendment and petition alleging among other matters that since the institution of the original complaint by the City of Cleveland The Public Utilities Commission of Ohio in a proceeding involving The East Ohio Gas Company and the City of Cleveland had investigated the reasonableness of the price charged by Hope to The East Ohio Gas Company and by an order dated January 10, 1939 had found the existing rate to be fair and reasonable. This order was later affirmed by the Supreme Court of Ohio. *East Ohio Gas Company v. Public Utilities Commission*, 137 Ohio State 225 (1940). Thereafter on

March 10, 1939 the City of Cleveland filed supplements to its complaint as amended and to this petition by which it incorporated in the record the aforesaid decision of The Public Utilities Commission of Ohio and its appeal papers from such decision to the Supreme Court of Ohio, to which supplements Hope filed answers. The City of Cleveland's petition in proceeding No. G-113 and the supplement thereto were dismissed by the Commission by order of June 6, 1939.

On March 23, 1939 respondent Pennsylvania Public Utility Commission filed a complaint against Hope with the Commission praying that the Commission investigate the prices charged by Hope to The Peoples Natural Gas Company, Fayette County Gas Company and The Manufacturers Light and Heat Company and fix just and reasonable rates for the same. It also prayed that the Commission investigate and determine that Hope had since June 21, 1938 violated Section 4(a) of the Natural Gas Act. This complaint was docketed by the Commission as No. G-127 and Hope filed its answer thereto.

On October 3, 1939 the Commission issued an order consolidating said proceedings bearing its docket Nos. G-100, G-101, G-113 and G-127 for purposes of hearing, fixing a public hearing on December 4, 1939, requesting Hope to present at such hearing the statement of the cost of its property and plant which Hope was in the process of preparing and ordering Hope to "open and close these proceedings with the presentation of its evidence relevant and material to the question whether, in connection with any transportation or sale of natural gas subject to the jurisdiction of the Commission, any rate, charge or classification, demanded, observed, charged or collected by Hope, or any rule, regulation, practice or contract affecting such rate, charge or classification is unjust, unreasonable, unduly discriminatory or preferential." Hope thereupon filed its petition with the Commission for a reconsidera-

tion and rehearing of this order of October 3, 1939 upon the grounds, among others, that it arbitrarily, unreasonably, unlawfully and unconstitutionally attempted to impose the burden of proof upon Hope and denied it a fair hearing by requiring it to present proof of its innocence of violations of the Natural Gas Act simply because the complainants had filed general claims that it was guilty of such violations, instead of requiring it to meet only specific charges and specific evidence against it as these were produced. The Commission by its order of November 28, 1939 denied Hope's petition for a reconsideration and rehearing of its order dated October 3, 1939, but postponed the date of the commencement of public hearings to April 1, 1940.

By orders dated April 2, 1940 the Commission permitted the State of West Virginia and The Public Service Commission of West Virginia to intervene in the four proceedings previously consolidated and by order dated May 28, 1940 permitted the City of Toledo, Ohio, to intervene in the proceedings bearing docket No. G-113.

In April and June, 1940 hearings were held before the Honorable Edward B. Marsh, a Trial Examiner appointed and designated for the purpose by the Commission, at which hearings Hope was required pursuant to said order of October 3, 1939 to present evidence sustaining the reasonableness of its interstate rates although none of the respondents herein had made any specific claims as to the respects in which said rates were unreasonable and none had presented any evidence. By order dated December 20, 1940 the Commission denied a motion of the Cities of Cleveland and Akron for an immediate order reducing Hope's rates to The East Ohio Gas Company.

Further hearings were postponed by the Examiner or by the Commission from June, 1940 until March 3, 1941. Between that date and July 19, 1941 the taking of evidence was concluded by testimony of members of the Com-

mission's staff and rebuttal testimony presented by Hope. The other respondents and the interveners conducted some cross-examination but presented no other evidence.

On September 30, 1941 Hope filed an application with the Commission that Examiner Marsh be directed to serve upon it, promptly after its delivery to the Commission, a copy of any report that he might make in these proceedings to the Commission and that a reasonable time thereafter be fixed within which Hope should have an opportunity to file with the Commission its exceptions and objections to such report, and further requesting oral argument before the Commission *en banc*. By its order of October 3, 1941 the Commission denied Hope's application for service upon it of the Trial Examiner's report and fixed October 27, 1941 as the date for oral arguments.

On October 21, 1941 Hope filed a petition for a reconsideration and rehearing of the Commission's order of October 3, 1941 pointing out that those who are brought into contest with the Government in a quasi-judicial proceeding aimed at control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues a final command, that in these proceedings Hope had not yet been advised of what the Commission proposed, and that its denial of service of the Examiner's report denied it such advice. Hope also pointed out that it is the uniform practice of all important federal administrative bodies that when evidence is heard by a Trial Examiner the report of such examiner is served upon all interested parties who are given an adequate opportunity to take exceptions before the administrative body enters its final order; and that in departing from such uniform practice the Commission violated the provisions of the Natural Gas Act which require a full and fair hearing, satisfying not only the constitutional requirements of due process of law but also the basic principles of proper administrative procedure. By

an order dated November 4, 1941 the Commission denied this application for a rehearing.

On October 27, 1941 oral argument was had before the Commission *en banc*.

On June 1, 1942 the Commission served upon Hope its "Order Reducing Rates" and its "Findings As To Lawfulness Of Past Rates," dated May 26, 1942, which contain a number of findings, incorporate therein the Commission's Opinion No. 76, and are the orders herein petitioned to be reviewed by this Honorable Court.

Said "Order Reducing Rates" ordered Hope: (A) to decrease its interstate rates on an annual basis by not less than $3,609,857; (B) to charge its five interstate customer companies in the future average rates per thousand cubic feet of gas as follows: The East Ohio Gas Company, 29.5¢, The Peoples Natural Gas Company, 28.5¢, Fayette County Gas Company, 28.5¢, The Manufacturers Light and Heat Company, 28.5¢ and The River Gas Company, 35¢; (C) to file on or before July 1, 1942 new schedules of rates reflecting not less than such reduction and providing for such average rates; (D) to make such new schedules effective as to all bills based on meter readings made on or after July 15, 1942; and (E) on and after the effective date of such new schedules to cease and desist from making, demanding or receiving any rates and charges other than those so ordered until changed by order of the Commission. Said order required a substantial reduction in the average rates charged by Hope to each company except The River Gas Company, which latter rate was not changed by said order.

In said "Findings As To Lawfulness Of Past Rates" the Commission found, among other matters, that the interstate rates charged by Hope were unjust, unreasonable and excessive and therefore unlawful to the extent of $920,029 for the year 1939, $4,210,154 for the year 1940 and $3,609,857 annually since 1940, and that the rates

charged by Hope to said The East Ohio Gas Company were unjust, unreasonable, excessive and therefore unlawful to the extent of $830,892 during 1939, $3,219,551 during 1940, and $2,815,789 annually since 1940; and declared that "Since the enactment of the 1938 Natural Gas Act this Commission has had exclusive jurisdiction to determine the lawfulness of the interstate wholesale rates charged by Hope and other natural gas companies."

On June 24, 1942 Hope filed with the Commission its application for a reconsideration, rehearing and stay of the Commission's said findings and orders dated May 26, 1942 in accordance with Sections 19(a) and 19(c) of the Natural Gas Act (15 U. S. C. Secs. 717r(a) and (c)). In this application Hope urged before the Commission each of the objections to said findings and orders which Hope requests this Honorable Court to consider and which are hereinafter set forth as the points on which Hope intends to rely.

On July 9, 1942 the Commission served upon Hope its order dated July 7, 1942 denying Hope's aforesaid application for a reconsideration, rehearing and stay of the Commission's findings and orders dated May 26, 1942.

(b)

THE FACTS AND THE STATUTES UPON WHICH VENUE IS BASED.

Hope was a party to proceedings under the Natural Gas Act as hereinbefore set forth. Hope is located entirely within the State of West Virginia and has its principal place of business at Clarksburg, West Virginia, all within the circuit of this Honorable Court.

The statute upon which venue is based is Section 19(b) of the Natural Gas Act (15 U. S. C. Sec. 717r(b)) which, so far as here pertinent, reads as follows:

> "(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in

such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. * * *"

(c)

THE RELIEF PRAYED.

Hope respectfully prays:

(1) That a copy of this petition be forthwith served upon a member of the Commission in accordance with Section 19(b) of the Natural Gas Act (15 U. S. C. Sec. 717r(b)), and upon the other respondents, the City of Cleveland, the City of Akron, and the Pennsylvania Public Utility Commission, in accordance with this Honorable Court's Rule 27;

(2) That the Commission be required, in compliance with said Section 19(b) of the Natural Gas Act, to certify and file with this Honorable Court a transcript of the record upon which the orders complained of in this petition were entered, including the pleadings, motions, applications, exceptions, exhibits, testimony, report of the Trial Examiner, various orders of the Commission and the final opinion, findings and orders of the Commission in said proceedings before it bearing its docket Nos. G-100, G-101, G-113 and G-127;

(3) That this Honorable Court review the Commission's said "Order Reducing Rates" and "Findings As To Lawfulness Of Past Rates" dated May 26, 1942 in said proceedings before the Commission;

(4) That after such review this Honorable Court set aside said orders, and each of them, in whole; and

(5) That this Honorable Court grant Hope such other and further relief as may be required by law and the Constitution of the United States and such other and further relief as may be just and equitable.

(d)

THE POINTS ON WHICH THE PETITIONER INTENDS TO RELY.

Hope intends to rely upon each of the separately numbered points set forth below. Without waiving any of these but solely for the convenience of this Honorable Court Hope states that the principal questions raised by these points are the following:

(a) Whether Hope was accorded a fair hearing in accordance with the Natural Gas Act and the Constitution.

(b) Whether a rate base which includes merely the depreciated book cost of Hope's property devoted to public service and ignores (i) the much larger original cost of that property, (ii) the much larger reproduction cost of that property, (iii) the 50% increase in the applicable price levels between the average dates that the property was constructed and the date the rate base was determined, and (iv) all evidence whatsoever of the much larger present value of that property is a valid rate base under the Natural Gas Act and the Constitution.

(c) Whether a rate base from which has been deducted a theoretical calculated depreciation reserve which is much greater percentagewise than the actual accrued deprecia-

tion in Hope's property determined by engineering observation, measurements and judgment and from the actual depreciation experience of the property is a valid rate base under the Natural Gas Act and the Constitution.

(d) Whether the amounts allowed in the rate base for unoperated leaseholds, additional capital expenditures and working capital were reasonable and proper allowances under the Natural Gas Act and the Constitution.

(e) Whether the Commission can under the Natural Gas Act and the Constitution fix the fair rate of return in accordance with what it found to be present day costs of money, while fixing the rate base in accordance with the varying costs of property over the last forty years, in view of the uncontradicted evidence that at the times said property costs were actually incurred the costs of capital for such enterprises were very substantially higher than present day capital costs.

(f) Whether in fixing rates for the future the Commission can under the Natural Gas Act and the Constitution wholly ignore Hope's operating experience in the past and particularly for the years 1937 to 1939, both inclusive, and base future rates solely on the abnormal war year 1940.

(g) Whether the Commission properly determined certain operating expenses of Hope.

(h) Whether the Commission under the Natural Gas Act has any authority whatever to consider or pass upon the lawfulness of Hope's past rates fixed by schedules filed with it; and, if it has such authority, whether it did not commit for past years the same errors on rate base, rate of return and operating expenses as it committed in fixing Hope's future rates, as well as additional errors.

The points which raise these and some other questions, upon each of which points Hope relies and each of which was urged before the Commission as an objection by Hope

in its application for a reconsideration, rehearing and stay which the Commission denied as hereinbefore set forth, are as follows:

PART A

As To The Commission's "Order Reducing Rates":

Point 1.

The Commission failed to accord Hope the hearing required by Section 5(a) of the Natural Gas Act (15 U. S. C. Sec. 717d(a)) and the fair hearing required by the due process clause of Amendment V to the Constitution of the United States, particularly in putting on Hope the effective burden of proof to establish the justness and reasonableness of its interstate rates; in requiring that such burden be discharged by Hope without being apprized of the specific claims of the complainants, respondents the Cities of Cleveland and Akron and the Pennsylvania Public Utility Commission, or the Commission against it; in adopting and applying in said findings and orders after closing the taking of evidence the very rate base theories which during the taking of the evidence it rejected in its order of December 20, 1940 denying the motion of the Cities of Cleveland and Akron for an immediate order reducing rates; in refusing by its order of October 3, 1941 to serve upon Hope a copy of the report of its Examiner, who alone heard all the evidence; and in denying Hope any opportunity to except to said Examiner's report and be heard thereon or to know otherwise, prior to the Commission's orders served June 1, 1942, either the specific claims against its rates or the action thereon contemplated by the Commission. The Commission therefore erred in stating in its Opinion No. 76, incorporated by reference in said findings and orders, that "Each party to these proceedings was cognizant of the issues and was afforded ample opportunity to present evidence."

Point 2.

The Commission exceeded the power and authority delegated to it by the Natural Gas Act, and the power and authority constitutionally delegable to it by Congress, by adopting and applying a rule that whether rates for interstate sales of natural gas are unjust, unreasonable and excessive, and therefore unlawful, under Sections 4(a) and 5(a) of the Natural Gas Act (15 U. S. C. Secs. 717c(a) and 717d(a)) is to be determined solely and exclusively upon the rate of return earned upon a so-called rate base consisting of the book cost, adjusted only for so-called accounting errors, of the properties rendering such service, less a hypothetical depreciation reserve requirement, plus working capital, irrespective of the relationship of such adjusted book cost, or of such adjusted book cost less such hypothetical reserve requirement, to the original cost or the present value of such properties. Under this rule the Commission gave no consideration to the rate of return earned upon the present value, or upon the original cost or the actual legitimate cost or such cost less the actual existing depreciation, of such properties of Hope, all of which constitutes legislation and administration by the Commission in excess of its statutory and constitutional powers.

Point 3.

The Commission failed to discharge the duty imposed upon it by the Natural Gas Act, including Section 6(a) thereof (15 U. S. C. Sec. 717e(a)), of investigating, ascertaining and considering the fair value of Hope's properties, or the facts bearing thereon, in determining rates and charges for Hope's interstate sales. Neither the facts bearing on the fair value of Hope's property nor such fair value itself were at any time investigated, ascertained or considered by the Commission's staff or by the Commission.

Point 4.

The Commission erroneously construed the term "actual legitimate cost" as used in Section 6(a) of the Natural Gas Act and the term "original cost" as used in Section 6(b) of the Natural Gas Act (15 U. S. C. Sec. 717e(b)) as meaning the book cost of the property of a natural-gas company, adjusted only for so-called accounting errors, and erroneously failed to construe said terms to mean the amounts of money or its equivalent actually spent to construct the property. The Commission, erroneously, investigated and ascertained only such book cost of Hope's property and, erroneously, neither investigated nor ascertained the original cost or the actual legitimate cost of Hope's property.

Point 5.

The Commission erroneously construed the term "the depreciation therein" as used in Section 6(a) of the Natural Gas Act as meaning merely a hypothetical depreciation reserve requirement, calculated on accounting principles, applicable to the adjusted book cost of the property of a natural-gas company, and erroneously failed to construe said term to mean the depreciation actually existing in the property of a natural-gas company. The Commission, erroneously, neither investigated nor ascertained the depreciation actually existing in Hope's property, but merely calculated the depreciation reserve which it thought should appear on Hope's books and treated this revised book depreciation reserve as "the depreciation" in Hope's property. The Commission further erroneously construed said term "the depreciation therein" as including estimated sums which a natural-gas company may spend in the future to abandon its property. It erroneously included in its revised book depreciation reserve for Hope many millions of dollars which it estimated Hope would spend in the

future to abandon its properties and erroneously treated these estimated future operating expenses as "depreciation" in Hope's property.

Point 6.

The Commission erroneously construed Sections 4(a) and 5(a) of the Natural Gas Act to mean that a rate and charge which in any one year produced any amount in excess of 6½ per cent return upon the book cost, adjusted only for so-called accounting errors, of the properties rendering such service, less a hypothetical depreciation reserve requirement, plus working capital, is in such year not just and reasonable, but is unjust and unreasonable and hence unlawful, and that it is authorized to fix as the just and reasonable rate and charge for each year one which would produce only such return. The Commission rigorously applied this erroneous construction in considering and fixing Hope's interstate rates.

Point 7.

The Commission erred in not finding that the rates charged and received by Hope for the transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption are just and reasonable and erred in finding that they are unjust, unreasonable and excessive, and therefore unlawful, to the extent of $3,609,857 annually and in ordering that such rates be decreased (a) to reflect a reduction in revenues on an annual basis of not less than $3,609,857 and (b) to produce average rates for the following customer companies for the future as follows:

	Average Rate Per M.c.f.—Cents
The East Ohio Gas Company	29.5
The Peoples Natural Gas Company	28.5
Fayette County Gas Company	28.5.
The Manufacturers Light and Heat Company	28.5

*(Findings (24), (25), (26), and Orders (A) to (E), inclusive, of "Order Reducing Rates").**

In not finding Hope's rates just and reasonable as aforesaid and in making said findings and order and the further findings and conclusions next italicized *(first (except 1st sentence), second, sixth (including table), eleventh and twelfth paragraphs under heading "Reasonable Earnings and Rates for the Future" of Opinion No. 76)*:

(a) The Commission proceeded unlawfully, exceeded its statutory and constitutional powers and erroneously construed the terms and provisions of the Natural Gas Act as set forth in Points 1, 2, 3, 4, 5 and 6 above;

(b) The Commission acted arbitrarily, unreasonably and without support in the evidence and erroneously incorporated, reflected and relied upon the erroneous findings and conclusions set forth in Points 8 to 21, inclusive, below; and

(c) The Commission prescribed rates and charges which do not permit Hope to earn the just compensation for the use of its property in public service, or the fair return on the present fair value of its property, to which it is entitled under Amendment V to the Constitution of the

* This and subsequent italicized references to said "Order Reducing Rates" and said "Findings As To Lawfulness Of Past Rates" and said Opinion No. 76 as incorporated thereto designate specific findings, orders, statements and conclusions of the Commission constituting error and herein urged as points of objection by Hope.

United States and which deprive it of its property without due process of law and take it for public use without just compensation in violation of said Amendment V, by reason of which said "Order Reducing Rates" and the rates and charges prescribed for Hope by the Commission therein are unconstitutional and void.

Point 8.

The Commission erroneously gave no consideration whatever to any of the extensive evidence in the record of the reproduction cost new, and less depreciation, of Hope's property devoted to its interstate service and erroneously rejected relevant evidence thereof consisting of agreements between complainants, the Cities of Cleveland and Akron, and Hope's affiliate, The East Ohio Gas Company, as to the reproduction cost new and less depreciation of such properties of Hope (Exhibits 121 and 122, Record, pp. 5927-5945). The Commission should have found, and erred in not finding, that the reproduction cost new of said physical properties (exclusive of property used to transport coke oven gas and property acquired by Hope from the Reserve Gas Company (excluded by agreement, see footnotes 3 and 4 of Opinion No. 76), leaseholds and working capital and without any allowance for the development of Hope's business or for going concern value or for discovery or other value of gas leaseholds) was $94,973,856 as of December 31, 1938, $94,894,072 as of December 31, 1939 and $95,882,315 as of December 31, 1940. It not only ignored each and every part of Hope's evidence thereon, but it ignored all other evidence of reproduction cost and failed to investigate, make and consider a reproduction cost estimate of its own. These actions of the Commission and each of them, and the findings and conclusions next italicized, are arbitrary, unreasonable, unlawful, unconstitutional, without support in the evidence and reflect the errors specified in Points 1, 2, 3, 4 and 5

above. *(Finding (7) of "Order Reducing Rates"; second, third, fourth, eighth and ninth paragraphs and footnote 6 under the heading "The Company's Estimates of Reproduction Cost and Trended 'Original Cost'" of Opinion No. 76).*

Point 9.

In arriving at its so-called rate bases the Commission erroneously ignored all evidence of the very great changes in price levels that occurred between the dates at which various items of Hope's interstate properties were constructed, beginning with 1891, and the present and erroneously failed to take notice of such changes as a matter of common and judicial knowledge. It should have found, and erred in not finding, that approximately one-half of Hope's properties in interstate service on December 31, 1938 were constructed prior to 1917 at an original cost of approximately $25,000,000 and the other half since that date at an original cost of approximately $45,000,000; that the original cost of said properties of approximately $70,000,000 adjusted to actual 1938 prices would have been more than $105,000,000 and that the present level of prices applicable to Hope's properties is on the average 50 per cent above the price levels at which said properties were actually constructed. The Commission not only ignored all evidence of the changing price levels but it did not itself investigate, determine or give any consideration to any change in the level of prices applicable to Hope's properties between the respective dates at which Hope's interstate properties were actually constructed and the date of its investigation, either as an important factor bearing upon the rate base or present fair value or the fair return or otherwise. The Commission's findings and conclusions as to Hope's evidence of the trended original cost of its properties as next italicized and its failure to make such findings and to investigate and consider any change in the

level of applicable prices, and each of them, are arbitrary, unreasonable, unlawful, unconstitutional, without support in the evidence, and reflect the errors specified in Points 1, 2, 3, 4 and 6 above. *(Finding (8) of "Order Reducing Rates"; fifth (except the first two sentences), sixth, seventh, eighth and ninth paragraphs and footnote 6 under the heading "The Company's Estimates of Reproduction Cost and Trended 'Original Cost'" of Opinion No. 76).*

Point 10.

The Commission erroneously did not find either the original cost or the actual legitimate cost of Hope's properties. The Commission should have found, and erred in not finding, that the original cost and the actual legitimate cost of Hope's properties (exclusive of distribution properties, property used to transport coke oven gas, property acquired by Hope from the Reserve Gas Company and working capital) was $69,735,638 as of December 31, 1938, $69,609,811 as of December 31, 1939 and $70,574,297 as of December 31, 1940. The Commission's failure to make such findings and its findings and conclusions as to Hope's evidence of the original cost of its property as next italicized, and each of them, are arbitrary, unreasonable, unlawful, unconstitutional, without support in the evidence, and reflect the errors specified in Points 1, 2, 3, 4 and 6 above. *(Findings (9) and (10) of "Order Reducing Rates"; second paragraph under the heading "Actual Legitimate Cost"; first (except the 1st and 5th sentences), third (except the (1st and 2nd sentences), fifth (1st sentence only), seventh (last sentence only), eighth, ninth (first and last sentences only), tenth, eleventh, thirteenth (except table), fourteenth (last 3 sentences only) and fifteenth (except the 1st sentence) paragraphs and Table A under the heading "The Company's Estimated 'Original Cost'"; and each paragraph under the heading "Impropriety Of Including In Rate Base Items Previously Charged To Expense" of Opinion No. 76).*

Point 11.

The Commission erroneously found what it termed the "actual legitimate cost" of Hope's property (exclusive of distribution property, property used to transport coke-oven gas, and unoperated acreage) to be Hope's "Gross Investment in Gas Plant in Service" as follows:

As of December 31, 1938	$51,207,621
As of December 31, 1939	51,019,585
As of December 31, 1940	51,957,416
For the Future	51,957,416

(Finding (11) of "Order Reducing Rates").

Said findings and the findings and conclusions next italicized, and each of them, are arbitrary, unreasonable, unlawful, unconstitutional, without support in the evidence, and reflect the errors specified in Points 1, 2, 3, 4, 6 and 10 above. *(Table A; all paragraphs and table (except findings as to net additions in 1939 and 1940) under heading "Actual Legitimate Cost or Gross Plant Investment"; last 2 sentences of first paragraph and the subsequent text and table under heading "Conclusions With Respect to the Rate Base" of Opinion No. 76).*

Point 12.

The Commission erroneously found what it termed the "actual existing depletion and depreciation" in Hope's property (exclusive of distribution property, property used to transport coke oven gas and unoperated acreage) to be as follows:

As of December 31, 1938	$21,188,122
As of December 31, 1939	21,737,823
As of December 31, 1940	22,328,016
For the Future	22,328,016

(Finding (12), of "Order Reducing Rates"; table and last paragraph under heading "Conclusions With Respect to the Rate Base" of Opinion No. 76).

The Commission should have found, and erred in not finding, that the "actual existing depletion and depreciation" in Hope's said properties, and "the depreciation therein," was no more than approximately 34.5 per cent of the undepreciated value of the physical properties and 71.5 per cent of the original acquisition cost of the operated leases (or an average of 35.15 per cent as of December 31, 1938, 36.06 per cent as of December 31, 1939 and 36.71 per cent as of December 31, 1940). Said findings and the further findings and conclusions next italicized, and said failure to make such findings, and each of them, are arbitrary, unreasonable, unlawful, unconstitutional, without support in the evidence and reflect the errors specified in Points 1 to 6 and 8 to 11, inclusive, above. *(First (1st sentence only), second, third and fourth paragraphs under the heading "Depletion and Depreciation"; first (2nd sentence only), third (last sentence only), fourth (1st sentence only), fifth, sixth (1st, 3rd and last sentences and footnote 20 only), seventh, eighth (first 2 sentences, footnote 22 and first 2 sentences after "(3)" only), ninth, tenth, and twelfth paragraphs under the heading "The Required Reserve For Depletion and Depreciation" and second sentence under heading "Rate Base" of Opinion No. 76).* Said findings also:

(a) Disregard all the evidence as to the actual existing depreciation and depletion in said properties as determined by observation, measurement, engineering and operating judgment, the actual depreciation experience of said properties and the decline in gas content, in favor of hypothetical accounting reserves, applicable only to book costs, based on estimated annual depreciation and depletion rates and on estimated accruals necessary to provide for the future expense to abandon properties;

(b) Apply erroneous estimated annual rates of depreciation and depletion based on estimated service lives of short duration and on estimated depletion percentages which disregard Hope's actual experience on depreciation,

depletion and salvage and which have no foundation in fact; and

(c) Calculate excessive depreciation and depletion reserves by application of the aforesaid erroneous annual rates and by assuming, contrary to the facts and to the evidence, that the "existing depletion and depreciation" in the properties purchased by Hope at the time of their purchase was measured by the book depreciation and depletion reserves of the companies from which Hope purchased such properties; that Hope's book reserves measure the "actual existing depletion and depreciation" in Hope's autos and trucks and drilling and cleaning equipment; that the hypothetical reserve for depreciation of Hope's communication equipment should be sufficient at the present time not only to retire all of the present communication equipment at the end of its estimated useful life but all of the communication equipment which Hope has ever retired from the beginning of business to date; that each field line will be abandoned upon the exhaustion of the particular gas pool areas to which the Commission assigned it as these alleged pools existed at December 31, 1938; that field lines will handle gas only from wells existing on December 31, 1938; that the depletion of 772 existing wells can be based on the rate of gas production from all of Hope's abandoned wells plus its existing 3300 wells; that an estimated amount for the future cost of abandoning properties constitutes "existing depletion and depreciation" and that there is additional existing depletion of over $2,100,000 in such of Hope's properties as were originally capitalized on its books, including therein the construction costs of only 772 wells, by reason of the fact that in the future it will cost an estimated $3,285,000 to abandon Hope's 3300 existing wells.

Point 13.

The Commission erroneously found that its purported "actual legitimate cost" of Hope's property (exclusive of distribution property, property used to transport coke oven gas and unoperated acreage), less its purported "actual existing depletion and depreciation," is as follows:

As of December 31, 1938	$30,019,499
As of December 31, 1939	29,281,762
As of December 31, 1940	29,629,400
For the Future	29,629,400

(Finding (13) of "Order Reducing Rates;" table and last paragraph under heading "Conclusions With Respect to the Rate Base" of Opinion No. 76).

Said findings, and each of them, are arbitrary, unreasonable, unlawful, unconstitutional, without support in the evidence, and reflect the errors specified in Points 1, 2, 3, 4, 5, 6, and 8 to 12, inclusive, above. The Commission should have found, if it desired to find the original cost or actual legitimate cost of said properties of Hope, less actual existing depletion and depreciation, and erred in not finding the same to be $44,781,361 as of December 31, 1938, $44,083,535 as of December 31, 1939 and $44,246,477 as of December 31, 1940. The Commission further erred in deducting any amount for depletion or depreciation from the original cost or actual legitimate cost of Hope's properties for rate base purposes.

Point 14.

The Commission erroneously found what it termed the "actual legitimate cost" of Hope's unoperated acreage to be as follows:

As of December 31, 1938	$584,382
As of December 31, 1939	567,152
As of December 31, 1940	566,105
For the Future	566,105

(Finding (15) of "Order Reducing Rates;" last full sentence under the heading "Other Used and Useful Property" and table and last paragraph under heading "Conclusions With Respect to the Rate Base" of Opinion No. 76).

The Commission should have found, and erred in not finding, that the original cost and the actual legitimate cost of such unoperated acreage was $681,882 as of December 31, 1938, $664,652 as of December 31, 1939 and $663,605 as of December 31, 1940. Said findings and said failure to make such findings, and each of them, are arbitrary, unreasonable, unlawful, unconstitutional, without support in the evidence and reflect the errors specified in Points 4 and 10 above.

Point 15.

The Commission erroneously found that the working capital necessary for the continued and efficient operation of Hope's interstate natural gas business is as follows:

As of December 31, 1938	$2,100,000
As of December 31, 1939	2,100,000
As of December 31, 1940	2,125,000
For the Future	2,125,000

(Finding (16) of "Order Reducing Rates;" third and fourth paragraphs under heading "Materials and Supplies Plus Cash Working Capital" and table and last paragraph under heading "Conclusions With Respect to the Rate Base" of Opinion No. 76).

The Commission should have found, and erred in not finding, that said amount should be $2,997,230 in each year. Said findings, and said failure to make such finding, and each of them, are arbitrary, unreasonable, unlawful and without support in the evidence.

Point 16.

The Commission erroneously found that Hope's additional capital expenditures (less increases in depletion and depreciation reserves) in the three-year period 1941-1943 would result in an average increase in net actual legitimate cost for that period of only $1,392,021. *(Finding (17) of "Order Reducing Rates;" text and footnote under heading "Estimated Additional Fixed Capital Expenditures" and table and last paragraph under heading "Conclusions With Respect to the Rate Base" of Opinion No. 76).* The Commission should have found and erred in not finding that the actual increase in net actual legitimate cost by July 1, 1942, when Hope was ordered to file new rates, upon the basis of its own estimates of annual depletion and depreciation, was $2,027,021, and that for the future period after July 15, 1942, for which the Commission ordered new rates, the average increase in net actual legitimate costs would be at least an additional $2,027,021. Said findings and said failure to make such findings, and each of them, are arbitrary, unreasonable and unlawful.

Point 17.

The Commission erroneously found, and used as the basis of its said order, rate bases as follows:

As of December 31, 1938	$32,703,881
As of December 31, 1939	31,948,914
As of December 31, 1940	32,320,505
For the Future	32,712,526

(Finding (18) of "Order Reducing Rates;" table and last paragraph under heading "Conclusions With Respect to the Rate Base" of Opinion No. 76).

Upon the basis of the evidence before it, upon the evidence which it erroneously excluded as set forth in Point 8 above and the relevant evidence of the determinations by the State of West Virginia of the true value in money of Hope's physical property which the Commission erroneously rejected (Exhibits 108 and 109, Record, pp. 5399-5429), or upon its own investigation as to the present value of Hope's interstate properties, which the Commission erroneously failed and refused to make, the Commission should have found, and erred in not finding, that the present value of said properties was not less than $66,360,837 as of December 31, 1938, $65,404,707 as of December 31, 1939, $65,392,233 as of December 31, 1940 and $68,265,225 for the future, and that for the purpose of determining just and reasonable rates the rate base should be represented by said present values. Said findings, said rejections of relevant evidence, said failure to make investigation, and said failures to make such findings, and each of them, are arbitrary, unreasonable, unlawful, unconstitutional, without support in the evidence, and reflect the errors specified in Points 1 to 6 and 8 to 16, inclusive, above.

Point 18.

The Commission erroneously found that the fair rate of return for Hope is not more than 6½ per cent upon the rate bases found by it and that $2,191,314 is the maximum fair annual return which Hope is entitled to earn in the future. *(Findings (18) and (19) of "Order Reducing Rates;" second and third paragraphs and footnote 5 under the heading "Corporate And Financial History;" first sentence under heading "Rate Base;" last paragraph under heading "Impropriety Of Including In Rate Base Items Previously Charged To Expense;" and all paragraphs except the first 5 sentences under heading "Rate of Return" of Opinion No. 76).* The Commission should

have found; and erred in not finding, that the fair rate of return on the present fair value of Hope's interstate property is not less than 8 per cent; that the fair rate of return upon a prudent investment or original cost or actual legitimate cost rate base for Hope's interstate property is not less than a weighted average of 11.8 per cent; and that the minimum fair annual return to which Hope is entitled from its interstate business and upon its interstate properties is at least $5,000,000. Said findings and said failures to make such findings, and each of them, are arbitrary, unreasonable, unlawful, unconstitutional, without support in the evidence, and reflect the errors specified in Points 1 to 6 and 8 to 17, inclusive, above.

Point 19.

The Commission erroneously found that Hope's operations for 1940, as adjusted by the Commission, are a proper basis for fixing future rates. *(Finding (20) of "Order Reducing Rates;" first paragraph under heading "Operating Revenues and Expenses;" first paragraph under heading "Future Operating Expenses;" and first paragraph (except 1st sentence) under heading "Reasonable Earnings and Rates for the Future" of Opinion No. 76).* The Commission should have found, and erred in not finding, that the year 1940 was a year of abnormal operations by Hope; that Hope's sales of gas in that year greatly exceeded those of any other year in the previous twenty; that Hope's operating expenses for that year were abnormally low (by at least $2,000,000) with relation to the volume of sales because of the necessity and temporary feasibility of meeting the sudden industrial demands of that year by excessive withdrawals from Hope's own gas reserves and at costs far below normal or average costs; and that Hope's average operating experience for the years 1937 to 1939, inclusive, or at most for the years 1937 to 1940, inclusive, adjusted for known increases in operating expenses, is the proper

basis for testing the reasonableness of present rates or fixing future rates. Said findings and said failures to make such findings, and each of them, are arbitrary, unreasonable, unlawful and without support in the evidence.

Point 20.

The Commission erroneously found that the proper credit to Hope's operating expenses by reason of the gasoline and butane extracted from its gas by its affiliate, Hope Construction & Refining Company, and the steam and boiler fuel furnished such company (except steam furnished at Goff Station), was $352,516 for 1939, $304,697 for 1940 and $304,697 annually since 1940. *(Finding (22) of "Order Reducing Rates;" all paragraphs and tables under heading "Affiliate's Excess Profits From Processing Hope Company's Gas" of Opinion No. 76).* The Commission should have found, and erred in not finding, that the proper credit resulting from such operations should be an average of $178,656 per year for the period 1937-1939, inclusive, and $174,288 per year for the period 1937-1940, inclusive. Said findings, and said failure to make such findings, and each of them, are arbitrary, unreasonable, unlawful, unconstitutional, without support in the evidence and reflect as to the property and operations of Hope Construction & Refining Company the same errors as specified with respect to the property and operations of Hope in Points 1 to 6 and 8 to 19, inclusive, above and 21 below.

Point 21.

The Commission erroneously found that the reasonable and proper allowances for Hope's operating expenses were as follows:

	1939	1940	Since 1940
Operating Expenses	$14,242,454	$15,775,195	$16,272,934
Miscellaneous Gas Revenues	(68,695)	(83,275)	(83,275)
Allocation of Costs to Local West Virginia Sales	(2,328,110)	(2,694,075)	(2,694,075)
Total Deductions from Interstate Revenues	$11,845,649	$12,997,845	$13,495,584

(Finding (23) of "Order Reducing Rates.")

The Commission should have found, and erred in not finding, that the reasonable and proper allowances for Hope's operating expenses (including amortization of reclassification and rate case expenses) and after allocation of costs to local West Virginia sales, miscellaneous gas revenues, and taxes (namely, the "Total Deductions from Interstate Revenues") were $13,157,098 for 1937, $12,980,238 for 1938, $12,646,399 for 1939, $14,658,087 for 1940, at least $15,475,034 annually since 1940 and at least $17,475,034 annually after July 15, 1942.

Said findings and the further findings and conclusions next italicized as follows: *all paragraphs under the heading "Depletion and Depreciation Expenses"; 4th, 5th, 6th and 8th sentences under heading "Reclassification and Rate Case Expenses"; second paragraph (3d, 4th, 7th and 8th sentences only) under the heading "Exploration and Development Costs"; all paragraphs under the heading "Affiliate's Excess Profits From Processing Hope Company's Gas"; third (except 1st sentence), sixth and seventh paragraphs under the heading "Other Adjustments to Operating Expenses"; amounts set forth for following items in the first table under heading "Operating Expenses Summary": "Excess Profits on Gasoline and Butane," "Steam Furnished H. C. & R. Co.," "Excess Cost of Coke-oven Gas," "Donations," "Expenses Applicable to Prior Years," "Adm. & General Expenses Capitalized in Error."*

"Depletion and Depreciation," "Reclassification and Rate Case Expenses," "Total Decreases," "Total Increases," "Total Adjustments"; amounts set forth for following items in the second table under the heading "Operating Expenses Summary" and in the last table before the heading "Rate of Return": "Natural Gas Production," "Transmission Expenses," "Administrative and General Expenses," "Depletion," "Depreciation" (interstate and specific distribution), "Exploration and Development Costs," "Taxes: State and Miscl. Federal," "Federal Income Tax" (as adjusted for future), "Total Interstate," "Total Distribution," "Total Operating Expenses"; second (except 1st sentence), fourth (except table) and fifth paragraphs and footnote 32 under the sub-heading "Federal Income Tax" of the heading "Operating Expenses Summary"; amounts set forth for following items in the first table after the sub-heading "Federal Income Tax" of the heading "Operating Expenses Summary" and in the first table under the heading "Reasonable Earnings and Rates for the Future": "Interstate Operating Expenses" and "Operating Expenses," "Allocation of Costs to Local West Virginia Sales" including "Specific Distribution Expenses" and "Return at 6½% on Distribution Property" in Footnote 31, "Federal Income Tax at 40%" (after income tax saving), "Total Deductions from Interstate Revenues," "Net Operating Revenue (Income) from Interstate Sales," "Return at 6½% on Interstate Rate Base," "Excess Earnings before Income Tax Saving," "Income Tax Saving," "Excess Earnings after Income Tax Saving," "Excess of Future Net Operating Income over 6½% Return"; second and fifth (3rd sentence only) paragraphs under the heading "Reasonable Earnings and Rates for the Future" of Opinion No. 76, and each of said findings and conclusions, and the failures of the Commission to make the findings it should have made as aforesaid, are

arbitrary, unreasonable, unlawful, unconstitutional and without support in the evidence, particularly because:

(a) The Commission erroneously based depreciation and depletion charges upon the book cost of Hope's properties, adjusted only for so-called accounting errors, in lieu of basing the same upon the present or replacement value of said properties as is required by the Natural Gas Act and in order to avoid depriving Hope of said properties without due process of law and taking them for public use without just compensation in violation of Amendment V to the Constitution of the United States. In so doing the Commission allowed no depreciation or depletion charge in respect of thousands of items of property owned by Hope which are actually existing and being consumed in the interstate service of Hope and for which no amounts whatsoever appear in said adjusted book cost;

(b) The Commission erroneously failed to allow any amount whatsoever for the annual depreciation and depletion of the net additional properties added by Hope since December 31, 1940 to date and now used in its interstate service, which the Commission found to total $1,392,021 and which it should have found as $2,027,021 as set forth in Point 16 above; and further erroneously failed to allow any amount whatsoever for the annual depreciation and depletion of the net additional properties which will be added by Hope as set forth in Point 16 above during the future period after July 15, 1942, for which the Commission ordered new rates;

(c) The Commission used erroneous annual depreciation rates which reflect erroneous estimated service lives and which disregard Hope's actual experience on depreciation and salvage and which have no foundation in fact, and applied hypothetical annual depletion calculations to the construction costs of a large portion of Hope's field lines which are subject only to depreciation and not to depletion;

(d) The Commission erroneously made no provision in operating expenses for the substantial actual expense incurred by Hope in abandoning its wells and other property actually abandoned since January 1, 1939 or for such actual expense as it will be incurred by Hope in substantial amounts in the future period for which the Commission ordered new rates, and erroneously requires Hope to pay such expenses from the cash or property previously acquired by Hope or from the return which the Commission purported to allow it for such period and the future;

(e) The Commission erroneously failed to include in Hope's 1940 operating expenses $165,963 actually expended by Hope in that year for a deep test well which proved nonproductive;

(f) The Commission erroneously allowed for the return to Hope on its West Virginia distribution properties only 6½ per cent upon the book cost of said properties less Hope's book depreciation reserve therefor, thus committing in respect of said distribution properties the errors committed in respect of Hope's interstate properties as set forth in Points 1 to 6 and 8 to 19, inclusive, above, and erroneously assuming, contrary to fact and without evidence, that Hope's book depreciation reserve for said properties measured the depreciation therein, and erroneously allowed as the annual depreciation allowance for such property only Hope's book depreciation charge, in lieu of allowing for such return and depreciation a total amount of not less than $250,000 per year;

(g) The Commission erroneously eliminated $16,455 from Hope's actual 1939 operating expenses and $16,882 from its actual 1940 operating expenses primarily for estimated property taxes allocated by the Commission to Hope's coke oven gas lines, although the evidence showed that Hope's total property taxes would have been the same irrespective of its ownership and operation of these lines;

(h) The Commission erroneously failed to make any allowance for interest upon Hope's reclassification and rate case expenses whose reimbursement to Hope the Commission deferred over a period of ten years, nor did it allow any provision in Hope's working capital in lieu of such interest provision;

(i) The Commission in calculating its claimed "Income Tax Saving" under the interstate rates prescribed by it erroneously overlooked, disregarded and neglected to take into account the fact that under the United States Internal Revenue Code the income tax depletion deductions which would be allowed Hope under the reduced rates prescribed by the Commission would decrease by at least one-third, thus, on the Commission's own theories, increasing the federal income tax payable by Hope in the future from the $76,579 allowed by the Commission to at least $379,696 and decreasing the so-called "Income Tax Saving" and the total amount of rate reduction calculated by the Commission by $303,117;

(j) The Commission further erroneously overlooked, neglected and failed to take into account the fact that the future federal income tax rate upon the earnings of Hope Construction & Refining Company will be at least 40 per cent instead of the actual tax rates in past years which the Commission reflected in its future credit for so-called excess profits from the gasoline and butane extracted by said company; and

(k) The Commission in using Hope's 1940 operating expenses, as adjusted by it, in fixing rates for the future made the errors specified in Point 19 above and further and erroneously failed to adjust Hope's operating expenses upward by at least $2,000,000 to reflect the fact that Hope's own production system can not supply during the period for which the Commission ordered new rates the volumes of gas produced therefrom in 1940, and otherwise failed to allow Hope sufficient amounts in its future oper-

ating expenses to explore for and produce, or to purchase, the abnormal quantities of gas which if has been called upon to deliver in 1940 and since and whose continued sale the Commission assumes in fixing the future rates ordered by it.

PART B

As To The Commission's "Findings As To Lawfulness Of Past Rates":

Point 22.

The Commission exceeded the power and authority delegated to it by the Natural Gas Act by making its said "Findings As To Lawfulness Of Past Rates" and erroneously determined that it had such jurisdiction and authority and that such findings are in the public interest (*Finding (2) of said "Findings"; fifth, ninth and succeeding sentences under heading "Lawfulness of Past Rates" of Opinion No. 76*).

Point 23.

The Commission erroneously construed the Natural Gas Act to mean that it had power and authority to determine that rates and charges contained in Hope's schedules filed with it in 1938, and which for that year on the basis of the Commission's theories and findings as adopted and applied in its said findings and orders failed by more than $1,170,000 to produce a 6½ per cent return on the rate base found by the Commission, became unjust, unreasonable and unlawful in any subsequent year in which they produced any amount in excess of said return on said rate base; and that it had power and authority to fix as the only, just, reasonable and lawful rate and charge for any past year the amount which would have produced precisely such return in such year had such rate or charge actually been in effect in such year. The Commission in said "Findings" rigorously applied this erroneous construction.

Point 24.

The Commission in said "Findings" erred in not finding that the rates charged and received by Hope for the transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption were, and in the future would be, just and reasonable and erred in finding (a) that said rates were unjust, unreasonable and excessive, and therefore unlawful, to the extent of $920,029 for the year 1939, $4,210,154 for the year 1940, and $3,609,857 since 1940 (on an annual basis) as set forth in finding (21); (b) that the total required revenue for all interstate service of Hope was for said years as set forth in finding (22); (c) that the just, reasonable and lawful rates for natural gas sold by Hope to The East Ohio Gas Company were those required to produce compensation in the amounts for said years set forth in finding (23); and (d) that the rates charged and received by Hope for the transportation and sale of natural gas to The East Ohio Gas Company were unjust, unreasonable, excessive, and therefore unlawful, to the extent of $830,892 during 1939, $3,219,551 during 1940, and $2,815,789 on an annual basis since 1940 as set forth in finding (24). In making said findings:

(a) The Commission proceeded unlawfully, exceeded its statutory and constitutional powers and erroneously construed the terms and provisions of the Natural Gas Act as set forth in Points 1, 2, 3, 4, 5, 6, 22 and 23 above;

(b) The Commission acted arbitrarily, unreasonably and without support in the evidence and erroneously incorporated, reflected and relied upon the erroneous findings and conclusions set forth in Points 25 to 27 below; and

(c) The Commission found rates and charges unjust, unreasonable and excessive, and therefore unlawful, as set forth in said findings (21) and (24), which permitted Hope to earn no more than the just compensation for the use of its property in public service, and the fair return on the

present fair value of its property, to which it is entitled under Amendment V to the Constitution of the United States; and in finding the total required revenue for all interstate service of Hope and that just, reasonable and lawful rates for natural gas sold by Hope to The East Ohio Gas Company were no more than those required to produce compensation in the amounts set forth in said findings (22) and (23), the Commission determined rates, required revenue and compensation which, if anywhere recognized or enforced, will deprive Hope of its property without due process of law and take such property for public use without just compensation in violation of said Amendment V, by reason of which said findings (21) to (24), inclusive, are unconstitutional and void.

Point 25.

With respect to findings (7), (8), (9), (10), (11), (12), (13), (14), (15), (16) and (19) of said "Findings" the Commission erred as to each to the extent, in the manner and for the reasons hereinbefore specified for the same or similar findings in said "Order Reducing Rates" and reference is hereby made to such of the above Points as are listed below as designating the several specific grounds of error urged as an objection by Hope to each and every such erroneous findings. The above Points so referred to, which are here incorporated as if here fully rewritten, relate to said erroneous findings as follows:

Finding	Points Above Here Referred to and Incorporated
(7)	8
(8)	9
(9)	10
(10)	10
(11)	11
(12)	12 and 13
(13)	14
(14)	15
(15)	16 and 17
(16)	18
(19)	20

Point 26.

The Commission erroneously found that Hope's actual operations for 1939 and 1940, respectively, are the reasonable and proper bases for determining lawful rates in each of those years, and that 1940 operations, as adjusted, are the reasonable and proper basis for determining lawful rates since 1940 as set forth in finding (17) of said "Findings." The Commission should have found, and erred in not finding, that the average of operations for the years 1937 to 1939, inclusive, or at most 1937 to 1940, inclusive, was a proper basis for determining lawful rates for the years 1938 to the present and for each of such years. The Commission further erred in disregarding the actual operations of Hope under its existing rates during the year 1938, upon the basis of which it would have found, applying all of its own theories, findings and conclusions as set forth in its said findings and orders, that the rates charged by Hope for its interstate service in 1938 were just and reasonable and failed to yield the fair annual return to which Hope was entitled by $1,170,534, and that the rates charged by Hope to The East Ohio Gas Company in 1938 failed to yield the compensation to which Hope was entitled by $817,588. The Commission further erred in unlawfully disregarding and in effect overruling its order of December 20, 1940, denying the motion of complainants, the Cities of Cleveland and Akron, for an immediate order reducing the rates of Hope to The East Ohio Gas Company. Said findings, said failure to make such findings, and such disregarding of actual operations and of its own previous order, and each of them, are arbitrary, unreasonable and unlawful and reflect the errors specified in Points 22 and 23 above.

Point 27.

The Commission erroneously made the findings as to the reasonable and proper allowances for Hope's operating expenses set forth in finding (20) of said "Findings" and in the paragraphs, tables and pages of said Opinion No. 76 referred to in Point 21 above. Said findings, the Commission's failures to make the findings referred to in Point 21 above, and each of them, are erroneous upon the grounds set forth in Point 21 which is here incorporated as if here fully rewritten, and upon the following additional grounds:

(l) The Commission erroneously and without any basis whatsoever in the evidence determined that $27,244 of Hope's operating expenses for 1939 was applicable to prior years;

(m) The Commission erroneously, and contrary to its own pronouncement in finding (17) of said "Findings," calculated past rates upon the theory that Hope paid only $39,716 federal income tax in 1939 and none whatsoever in 1940, although in fact it paid $191,521 in 1939 and $912,313 in 1940 as shown by the Commission's second tabulation under the heading "Operating Expenses Summary" of Opinion No. 76; and further erroneously assumed that had the Commission's past rates been in effect Hope would have paid only $39,716 federal income tax in 1939 and none whatsoever in 1940, whereas it would have paid substantial amounts even had said past rates been in effect by reason of the reduced income tax depletion deductions to which it would have been entitled under the United States Internal Revenue Code as set forth in Point 21 above.

WHEREFORE, Hope respectfully prays for relief as set forth above.

HOPE NATURAL GAS COMPANY,

By WILLIAM B. COCKLEY,

WALTER J. MILDE,

THEODORE R. COLBORN,
1759 Union Commerce Building,
Cleveland, Ohio,

WILLIAM A. DOUGHERTY,
30 Rockefeller Plaza,
New York, New York,

KEMBLE WHITE,

ANTHONY F. McCUE,
Clarksburg, West Virginia,
Its Attorneys.

STATE OF OHIO,
COUNTY OF CUYAHOGA, ss.

WALTER J. MILDE, being first duly sworn, says that he is attorney for Hope Natural Gas Company, a corporation, petitioner herein; that he is duly authorized in the premises; that he has read the foregoing Petition for Review; and that the matters and things therein stated are true as he verily believes.

WALTER J. MILDE.

SWORN TO before me and subscribed in my presence this July 16, 1942.

CATHERINE MARTIN,
Notary Public.

(Notarial Seal)

Same day, to-wit, July 18, 1942, notification to respondents of the filing of petition for review, together with a copy of the petition for review, transmitted by mail to Federal Power Commission, Washington, D. C.; City of Cleveland, Ohio; City of Akron, Ohio, and Pennsylvania Public Utility Commission, Harrisburg, Pennsylvania, respondents.

July 22, 1942, the appearance of William B. Cockley and William A. Dougherty is entered for the petitioner.

Same day, the appearance of A. F. O'Neil, Director of Law, and Clyde B. Macdonald, Assistant Director of Law, is entered for the respondent City of Akron, Ohio.

July 23, 1942, the appearance of Richard J. Connor, General Counsel, and Milford Springer, Counsel, is entered for the respondent Federal Power Commission.

Same day, the appearance of Kemble White is entered for the petitioner.

July 24, 1942, the appearance of Thomas A. Burke, Jr., Director of Law; Spencer W. Reeder, Assistant Director of Law in Charge of Utility Controversies; Robert E. May and Alex. W. Parker is entered for the respondent City of Cleveland, Ohio.

July 29, 1942, the appearance of Samuel Graff Miller; Harry M. Showalter; and Claude T. Reno, Attorney General, Commonwealth of Pennsylvania, is entered for the respondent Pennsylvania Public Utility Commission.

July 31, 1942, the appearance of Anthony F. McCue is entered for the petitioner.

August 28, 1942, the transcript of record is filed.

September 10, 1942, application of petitioner for special permission to file a brief exceeding 50 printed pages is filed.

September 12, 1942, order granting special permission to petitioner to file a brief in excess of 50 printed pages but not exceeding 215 printed pages is filed.

Same day, to-wit, September 12, 1942, motion of respondent, City of Cleveland, to dismiss Part B of Petition for Review is filed.

NOTE.—The motion to dismiss is in the words and figures following, to-wit:

United States Circuit Court of Appeals

FOR THE FOURTH CIRCUIT.

No. 4979.

October Term, 1942.

HOPE NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
CITY OF CLEVELAND,
CITY OF AKRON,
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

MOTION OF RESPONDENT, CITY OF CLEVELAND, TO DISMISS PART B OF PETITION FOR REVIEW AND BRIEF IN SUPPORT THEREOF.

THOMAS A. BURKE, JR.,
Director of Law,
204 City Hall,
Cleveland, Ohio,

SPENCER W. REEDER,
Assistant Director of Law in Charge of Utility Controversies,
204 City Hall,
Cleveland, Ohio,

ROBERT E. MAY,
520 Shoreham Building,
Washington, D. C.,
Attorneys for Respondent, City of Cleveland.

September 17, 1942.

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TABLE OF AUTHORITIES.

Cases.

Applicable Statute.

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United States Circuit Court of Appeals

FOR THE FOURTH CIRCUIT.

No. 4979.

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HOPE NATURAL GAS COMPANY,

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FEDERAL POWER COMMISSION,

CITY OF CLEVELAND,

CITY OF AKRON,

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents.

MOTION OF RESPONDENT, CITY OF CLEVELAND, TO DISMISS PART B OF PETITION FOR REVIEW.

The City of Cleveland, a respondent in the above entitled cause, moves this Honorable Court to dismiss Part B of the Petition for Review filed herein on the ground that the Court has no jurisdiction under Section 19(b) of the Natural Gas Act (52 Stat. 831; 15 U. S. C. A. 717r (b)) to review the "Findings as to Lawfulness of Past Rates" entered by respondent, Federal Power Commission, on May 26, 1942. These "findings" do not constitute an "order" within the meaning of Section 19(b) of the Natural Gas Act.

THOMAS A. BURKE, JR.,
Director of Law,

SPENCER W. REEDER,
Assistant Director of Law in Charge of Utility Controversies,

ROBERT E. MAY,
Attorneys for Respondent, City of Cleveland.

Notice of Motion.

Please take notice that this Motion of Respondent, City of Cleveland, to Dismiss Part B of Petition for Review will be brought on for hearing before this Honorable Court on the 5th day of October, 1942, or as soon thereafter as the Court may hear the same in the Postoffice Building in the City of Richmond, Virginia.

THOMAS A. BURKE, JR.,

SPENCER W. REEDER,

ROBERT E. MAY,

Attorneys for Respondent, City of Cleveland.

Proof of Service.

STATE OF OHIO,
CUYAHOGA COUNTY, ss.

Spencer W. Reeder, attorney for respondent, City of Cleveland, being first duly sworn, deposes and says that on the 11th day of September, 1942, he duly served a copy of the within motion and brief in support thereof upon counsel for petitioner, Hope Natural Gas Company, by depositing the same on such date in the United States Post Office at Cleveland, Ohio, in a sealed envelope, with postage prepaid, addressed to William B. Cockley, Attorney for Hope Natural Gas Company, at his post office address, 4759 Union Commerce Building, Cleveland, Ohio; that on the 11th day of September, 1942, he duly served a copy of the within motion and brief in support hereof upon counsel for respondent, Federal Power Commission, by depositing the same on such date in the

United States Post Office at Cleveland, Ohio, in a sealed envelope, with postage prepaid, addressed to Richard J. Connor, General Counsel, Federal Power Commission, Washington, D. C.; that on the 11th day of September, 1942, he duly served a copy of the within motion and brief in support thereof upon counsel for respondent, City of Akron, by depositing the same on such date in the United States Post Office at Cleveland, Ohio, in a sealed envelope, with postage prepaid, addressed to A. F. O'Neill, Director of Law, 304 Municipal Building, Akron, Ohio; that on the 11th day of September, 1942, he duly served a copy of the within motion and brief in support thereof upon counsel for respondent, Pennsylvania Public Utility Commission, by depositing the same on such date in the United States Post Office at Cleveland, Ohio, in a sealed envelope, with postage prepaid, addressed to Claude T. Reno, Attorney General, Pennsylvania Public Utility Commission, Harrisburg, Pennsylvania.

SPENCER W. REEDER.

Sworn to before me and subscribed in my presence this 11th day of September, 1942.

IRENE G. CASHMAN,

(Notarial Seal) *Notary Public.*

My Commission expires Mar. 27, 1944.

United States Circuit Court of Appeals

FOR THE FOURTH CIRCUIT.

No. 4979.

October Term, 1942.

HOPE NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
CITY OF CLEVELAND,
CITY OF AKRON,
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

BRIEF IN SUPPORT OF MOTION OF RESPONDENT, CITY OF CLEVELAND, TO DISMISS PART B OF PETITION FOR REVIEW.

STATEMENT.

On May 26, 1942, the respondent, Federal Power Commission, acting upon complaint of respondent, City of Cleveland, and after investigation and hearing, made what the Commission called "Findings as to Lawfulness of Past Rates."

For the convenience of the Court, a copy of said Federal Power Commission "Findings as to Lawfulness of Past Rates," together with the opinion incorporated by reference in said findings, has been printed as an appendix hereto.

Petitioner erroneously dubs the Federal Power Commission's "Findings as of Lawfulness of Past Rates" an "order" (Petition for Review, pp. 1, 2, 8), incorrectly as-

serts that the Commission attempted to "fix" past rates (Petition for Review, p. 35, Point 23); and devotes six points and five pages of its Petition for Review under the caption "Part B—As to The Commission's 'Findings As To Lawfulness of Past Rates'" to a purported appeal from these findings. (Petition for Review, pp. 35-39, incl.; Points 22-27, incl.)

Relying upon the established law in this circuit that mere "findings" of the Federal Power Commission are not reviewable *Carolina Aluminum Company v. Federal Power Commission*, 97 F. (2d) 433 (1938) (C. C. A. 4), and believing that a natural gas company cannot make such findings reviewable by the colorable device of calling them an order when they are not an order, respondent, City of Cleveland, has filed this Motion to Dismiss Part B of the Petition for Review.

We have filed this motion for the purpose of expediting and shortening the briefing, argument and determination of the issues raised by Part A of the Petition for Review, relating to the Commission's order fixing rates for the future, said Part A being a subject matter over which the Court has unquestioned jurisdiction. The granting of this motion in advance of the merits will eliminate nearly one fourth of the points raised in the Petition for Review.

Although the City of Cleveland would be delighted to have this or any other tribunal rule upon the merits of these findings,—which we believe are fully supported by the evidence, wholly within the jurisdiction of the Commission, and not otherwise unlawful—nevertheless we recognize that jurisdiction of a Court cannot be created by consent of the parties and that absence of jurisdiction cannot be excused by waiver of the parties. *United States v. Griffin*, 303 U. S. 226, 229; *Houston Natural Gas Corp. v. Securities and Exchange Commission*, 100 F. (2d) 5 (C. C. A. 4th, 1938).

We believe that an early ruling on this motion will expedite the case of *East Ohio Gas Company v. Cleveland*, P. U. C. O. 11,001, 11,218 and 11,442, which has already been pending for more than three years before The Public Utilities Commission of Ohio. The Federal Power Commission's "Findings as to Lawfulness of Past Rates" were avowedly made at the request of and for use by the City of Cleveland as evidence in said proceeding before The Public Utilities Commission of Ohio against Hope's affiliate, The East Ohio Gas Company, and in support of Cleveland's claim for a $5,000,000 refund to its people, as ultimate consumers.

Since this case involves questions of great public interest, which ought not to be confused by consideration of a separate cause of action over which this Court has no jurisdiction, we respectfully request that this motion be set down for early oral argument and that it be disposed of in advance of the merits.

History of the Federal Power Commission's "Findings as to Lawfulness of Past Rates."

On May 26, 1942, as aforesaid, the respondent, Federal Power Commission, made its "Findings as to Lawfulness of Past Rates." (R. 14202.)

As the "findings" recite, they were made at the request of respondent, City of Cleveland, as an aid to state regulation. (Appendix, finding (1).)

The ultimate "finding" is that (Appendix, finding (24)):

> "(24) The rates charged and received by the Hope Natural Gas Company for the transportation and sale of natural gas in interstate commerce to The East Ohio Gas Company for resale for ultimate public consumption were unjust, unreasonable, excessive, and therefore unlawful to the extent of $830,893 during 1939, $3,219,551 during 1940, and $2,815,789 on an annual basis since 1940."

The history of these "findings" is set forth in the opinion of the respondent, Federal Power Commission, as follows:

"LAWFULNESS OF PAST RATES:

"In 1938 the Cities of Cleveland and Akron, Ohio, filed complaints with the Federal Power Commission alleging that the rate which Hope charged East Ohio Gas Company was unjust, unreasonable and unlawful. These complaints were registered before Hope filed its five interstate wholesale rate schedules which are involved in these proceedings. The acceptance of a rate schedule for filing does not mean that the Commission approves it, and does not establish the justness or reasonableness of the rate. *Re Home Gas Co.*, 39 P. U. R. (N. S.) 102, 109. On October 14, 1938, the Commission instituted an investigation of the reasonableness of all of Hope's interstate rates. If it had been possible to adduce the volume of evidence required for the disposition of such a complex matter within a few months, the Commission would have prescribed the reasonable interstate wholesale rates for 1939 and subsequent years. The City of Cleveland raised the issue of the lawfulness of the rate charged Hope to the East Ohio Gas Company and asked this Commission, as an aid to State regulation, to make a separate determination of the reasonable rates since June 30, 1939. Originally the City of Cleveland requested this Commission to find the lawful Hope-East Ohio rates since June 21, 1938, but it now represents that the subject is idle for rates prior to June 30, 1939, because those rates which Cleveland consumers were obligated to pay East Ohio have been settled. The Commission does not have the authority to fix rates for the past and to award reparations. But Congress did empower and instruct the Commission in Section 5(a) of the Natural Gas Act to fix future rates, and as a step in that process we must necessarily consider the reasonableness of past and existing rates. When the issue is raised and the public interest will be served, we consider as a necessary part of that duty the power to examine the entire rate problem involved and to determine what rates were lawful in the past. Also, Section 14(a) of the Act authorizes

the Commission to investigate any facts which it finds necessary in order to determine whether Hope has violated any provision of the Natural Gas Act. Furthermore, the Commission has power to perform any act pursuant to Section 16, which is necessary or appropriate to carry out the provisions of the Act. Under Section 4(a) of the Act any interstate wholesale rate that is not just and reasonable is unlawful. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. ..... Hope's rate collected from East Ohio Gas Company was lawful after June 21, 1938, the effective date of the Act, only to the extent that it was just and reasonable. The City of Cleveland states that the Ohio Commission is investigating the reasonableness of the East Ohio Gas Company's bonded retail rates in Cleveland for the period since June 30, 1939, and that the lawfulness of Hope's rate is an important factor in the case. Since the enactment of the 1938 Natural Gas Act this Commission has had exclusive jurisdiction to determine the lawfulness of the interstate wholesale rates charged by Hope and other natural gas companies. (Sections 1, 2, 4 and 5(a). See *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298, 308; *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498, 506; *Kentucky Nat. Gas Corp. v. P. S. C.*, 28 F. Supp. 509, 513, aff 119 Fed. (2d) 417.)

"In response to the request of the City of Cleveland, the Commission will make the appropriate findings of fact as to the lawfulness of the rates charged East Ohio by Hope since June 30, 1939. The Interstate Commerce Commission has furnished precedents for the performance of this public duty. (*W. A. Barrows Porcelain Enamel Co. v. Cushman Motor Delivery Co.*, 11 M. C. C. 365, 366; *Dixie Mercerizing Co. v. ET & WNC Motor Transp. Co.*, 21 M. C. C. 491, 492. See *United States v. Morgan*, 307 U. S. 183, 313 U. S. 409; *Lima Tel. Co. v. P. U. C.*, 98 O. S. 110, 120 N. E. 330.) Congress intended that this Commission cooperate with State Commissions and municipalities, and the provisions of Sections 5(b) and 17 are special evidence of such intent."

At the oral argument before respondent, Federal Power Commission, counsel for petitioner conceded that such findings as to lawfulness of past rates are nonappealable, as follows (Milde, R. 14179):

> "We cannot appeal from any recital you make that the rates *were* unreasonable and unlawful in 1916 or 1928 or 1938, or any other time."

This concession was not one improvidently made in the heat of argument. Prior to the oral argument counsel for petitioner filed a printed memorandum with the Federal Power Commission, wherein they said ("Memorandum on Behalf of Hope Natural Gas Company as to the Commission's Jurisdiction in these Proceedings to Adjudge that the Company has in the past Violated the Natural Gas Act," p. 6n):

> "Section 19(b) of the Act does not authorize review of determinations by the Commission even as important as a determination that a company is a natural gas company under the Act. This Commission has so argued before all courts in which this matter has come up and it has been sustained in this construction. *Canadian River Gas Co. v. Federal Power Commission*, 110 F. (2d) 350, 113 F. (2d) 1010 (C. C. A. 10th, 1940); *New York State Natural Gas Corporation v. Federal Power Commission* (C. C. A. 2d, October 26, 1939, not reported); Cf. *East Ohio Gas Company v. Federal Power Commission*, 115 F. (2d) 385 (C. C. A. 6th, 1940)."

Nevertheless, on July 18, 1942, counsel for petitioner filed with this Court a pretended appeal from the Federal Power Commission's "Findings as to Lawfulness of Past Rates." (Petition for Review, Part B, pp. 35-39.)

Applicable Statute.

The only applicable statute is the Natural Gas Act Section 19(b), which provides (52 Stat. 831; 15 U. S. C. A. 717r (b)):

"(b) Any party to a proceeding under this chapter aggrieved by an *order* issued by the Commission in such proceeding may obtain a review of such *order* in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the *order* relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the *order* of the Commission upon the application for rehearing, a written petition praying that the *order* of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the *order* complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such *order* in whole or in part. No objection to the *order* of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original *order*. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such *order* of the

Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28, as amended." (Italics ours.)

Preliminary Analysis.

Under the Natural Gas Act Section 19(b), this Court has jurisdiction to review only "orders" of the Federal Power Commission. It has no jurisdiction to review mere findings.

The "Findings as to Lawfulness of Past Rates" from which petitioner attempts to appeal in Part B of the Petition for Review are not an order. They are findings.

These "findings" are not the basis of the Commission's order fixing rates for the future. That order is based on other findings which are attacked in Part A of the Petition for Review. Under the Natural Gas Act, the only finding that is necessary to a rate reduction order is the finding that the existing rate "*is* unjust, unreasonable, unduly discriminatory, or preferential." Natural Gas Act Section 5(a); 15 U. S. C. A. Section 717d; 52 Stat. 823. In this case, the Federal Power Commission's rate reduction order, fixing future rates, is based solely upon the findings incorporated therewith. Therefore, a consideration of the Federal Power Commission's "Findings as to Lawfulness of Past Rates" is not necessary in testing the reasonableness of the rate reduction order attacked in Part A of the Petition for Review. The Federal Power Commission's order fixing rates for the future which is attacked in Part A of the Petition for Review is not based upon the Federal Power Commission's "Findings as to Lawfulness of Past Rates."

The Federal Power Commission's "Findings as to Lawfulness of Past Rates" neither direct nor restrain any action on the part of petitioner. They neither command nor direct anything to be done. They carry no direction of

obedience to any previously formulated order of the Commission.

These "findings" are determinations of fact. They are not in substance an order. They are not even in form an order. They have no characteristic of an order, either affirmative or negative. They are only a decision on a controverted matter. These findings are a report—an opinion as distinguished from a mandate.

These findings may be evidence in another proceeding of a breach of statutory duty on the part of petitioner. But the Act imposed the duty. The "findings" do not.

The mere fact that these "findings" may be used as evidence against petitioner or its affiliate in another proceeding does not make them reviewable in this one.

Assuming arguendo that they are binding in another proceeding as between parties to the case below and their privies, unless unsupported by substantial evidence, outside the jurisdiction of the Commission, or otherwise unlawful, the "findings" are subject to challenge in such other proceeding on all these grounds, and petitioner or its privies will have their day in court when and if the findings are offered in evidence against them.

In the Natural Gas Act, Congress has distinguished carefully between orders, which it makes reviewable, and mere determinations, findings, and reports, which it does not make reviewable.

In the body of the statute, for example, Congress specifically mentions "orders" fixing future rates (Natural Gas Act, Section 5(a)); "orders" determining accounts in which particular outlays shall be entered, charged, or credited (Natural Gas Act, Section 8(a)); "orders" authorizing exporting or importing natural gas to or from a foreign country (Natural Gas Act, Section 3); "orders" requiring refund of proposed increased rates collected under bond (Natural Gas Act, Section 4(e)); "orders" directing a natural gas company to extend or improve its transporta-

tion facilities (Natural Gas Act, Section 7(a)); "orders" directing a natural gas company to establish physical connection of its transportation facilities with the facilities of, and to sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural gas or artificial gas to the public (Natural Gas Act, Section 7 (a)). Congress has authorized this Court to review such orders (Natural Gas Act, Section 19(b)).

On the other hand, in the body of the Natural Gas Act, Congress has referred to many determinations, reports, and findings, which it purposefully does not call "orders." For example, there is the determination of cost of production or transportation of natural gas by a natural gas company in cases where the Federal Power Commission has no authority to establish a rate governing the transportation or sale of such natural gas (Natural Gas Act, Section 5(b)). There are reports to Congress on information assembled relative to proposed interstate compacts dealing with the conservation, production, transportation, or distribution of natural gas (Natural Gas Act, Section 11(a)) and reports to Congress relative to operation of a compact between two or more states approved by Congress (Natural Gas Act, Section 11(b)). And there is the determination whether any person has violated or is about to violate any provision of the Act or any rule, regulation or order thereunder (Natural Gas Act, Section 14(a)). These findings, determinations, and reports Congress did not authorize the Circuit Courts of Appeals to review (Natural Gas Act, Section 19(b)).

Part B of the Petition for Review should be dismissed because it seeks review of mere "findings." Under Section 19(b) of the Natural Gas Act, it is only an order of the Federal Power Commission and not a finding that this Court is authorized to review.

ARGUMENT.

PETITIONER'S PRETENDED APPEAL FROM THE FEDERAL POWER COMMISSION'S "FINDINGS AS TO LAWFULNESS OF PAST RATES," SET FORTH IN PART B OF THE PETITION FOR REVIEW, SHOULD BE DISMISSED BECAUSE UNDER THE NATURAL GAS ACT SECTION 19(b) IT IS ONLY AN "ORDER" AND NOT A FINDING OF THE COMMISSION WHICH THIS COURT IS AUTHORIZED TO REVIEW.

A. The Commission's "Findings as to Lawfulness of Past Rates" are what the Commission called them—mere findings.

In *Carolina Aluminum Company v. Federal Power Commission*, 97 F. (2d) 435 (1938), (Parker, Circuit Judge), this Court declined to review a mere "finding" of the Federal Power Commission. Holding that Section 313(b) of the Federal Power Act, which is substantially identical with Section 19(b) of the Natural Gas Act, does not authorize review of a mere finding of the Federal Power Commission that the interests of interstate or foreign commerce would be affected by the proposed construction of a hydroelectric power project, this Court said at page 436:

"(1-3) The only statute under which we are given power to review actions of the commission is Sec. 313(b) of the Federal Power Act, 49 Stat. 860, 16 U. S. C. A. § 825*l*(b), the pertinent portion of which is as follows:

"'Any party to a proceeding under this Act (chapter) aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals * * * by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the rec-

ord upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.'

"It will be noted that it is an order and not a finding of the Commission which the court is authorized to review; and there would seem to be little room for doubt that by an order is meant some command of the Commission directing or restraining action or granting or denying some form of relief. An 'order' is a 'mandate, precept; a command or direction authoritatively given; a rule or regulation.' *Black's Law Dictionary*; 46 *C. J.* 1131; 42 *C. J.* 464. An order of the Commission is analogous to the judgment of a court; and it is well settled that findings constitute no part of a judgment even though incorporated in the same instrument with it. 15 *R. C. L.* 570; *Judge v. Powers*, 156 Iowa 251, 136 N. W. 315, Ann. Cas. 1915B, 280. As said by Judge Learned Hand in *Eckerson v. Tanney*, D. C., 235 F. 415, 418, 'The judgment itself does not reside in its recitals, but in the mandatory portions.' In reviewing an order the court may examine the findings to determine whether they support the order and may examine the evidence to determine whether it supports the findings; but the court is given no authority to review a mere finding upon which no order is based, even though it may determine a status which may form the basis of future governmental action, for even such a finding lacks the fundamental characteristics of an order. *Shannahan v. United States*, 58 S. Ct. 732, 82 L. Ed. ....; *United States v. Griffin*, 58 S. Ct. 601, 82 L. Ed. ....; *Piedmont & N. R. Co. v. United States*, 280 U. S. 469, 50 S. Ct. 192, 74 L. Ed. 551; *United States v. Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 47 S. Ct. 413, 71 L. Ed. 651; *Lehigh Valley R. Co. v. United States*, 243 U. S. 412, 37 S. Ct. 397, 61 L. Ed. 819; *Brady v. Interstate Com-*

merce Commission, D. C., 43 F. 2d 847, affirmed *Brady v. United States*, 283 U. S. 804, 51 S. Ct. 559, 75 L. Ed. 1424."

Similarly, in *Shannahan v. United States*, 303 U. S. 596 (1938) (Mr. Justice Brandeis), the Supreme Court of the United States held that a finding of the Interstate Commerce Commission that "the Chicago, South Shore and South Bend Railroad is not a street, interurban or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act," was not reviewable as an "order" within the meaning of the Urgent Deficiencies Act. Mr. Justice Brandeis, speaking for the court, said (303 U. S. 599, 601):

(p. 599) "The Commission intervened. Its answer, and that of the United States, challenged the jurisdiction of the court on the ground that the determination of the Commission was not an 'order' within the meaning of the Urgent Deficiencies Act. The case was heard before three judges on the pleadings and evidence; and a decree was entered dismissing the bill for want of jurisdiction, one judge dissenting. 20 F. Supp. 1002. The Trustees appealed.

"*First.* The function of the Commission is limited to the determination of a fact. Its decision is not even in form an order. It 'had no characteristic of an order, affirmative or negative.' *United States v. Illinois Cent. R. Co.*, 244 U. S. 82, 89; *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522, 527-28. *Compare Lehigh Valley R. Co. v. United States*, 243 U. S. 412, 414. But even if this difficulty is overlooked, others are insuperable. The decision neither commands nor directs anything to be done. 'It was merely preparation for possible action in some proceeding which may be instituted in the future.' *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, 310. The determination is thus not enforceable by the Commission; the only action which could ever be taken on it would be by some other body. • • •

(p. 601) "In order not to fail in the performance of these duties the Mediation Board had to satisfy itself whether the South Shore was a railroad within the exemption proviso. To that end, it applied to the Commission for its determination. If it had omitted to do so, the application might have been made 'upon complaint of any party interested.' The determination whether applied for by the Board, by a carrier, or by employees, is clearly not an order enforceable within the meaning of the cases construing and applying the Urgent Deficiencies Act. It is a decision on a controverted matter, comparable to those considered in *United States v. Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, in *Great Northern Ry. Co. v. United States*, 277 U. S. 172, in *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522, and in *United States v. Griffin, ante*, p. 226, which were held not to be subject to review under the Urgent Deficiencies Act."

Again, in *Shields v. Utah Idaho Central Railroad Company*, 305 U. S. 177 (1938) (Mr. Chief Justice Hughes), the Supreme Court of the United States reaffirmed the doctrine that a mere finding that a carrier is not an interurban railway and therefore is not exempt from the operation of the Railway Labor Act is not an order and is not reviewable under the Urgent Deficiencies Act. Mr. Chief Justice Hughes, speaking for the Court, said (305 U. S. 177, 179, 182-183):

(p. 179) "The Railway Labor Act, which applies to railroads engaged in interstate commerce, excepts any 'interurban' electric railway unless it is operating as a part of a general steam-railroad system of transportation. The Interstate Commerce Commission is 'authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power' falls within the exception. At the request of the Mediation Board, the Interstate Commerce Commission after hearing determined that the lines of respondent, the Utah Idaho Central Railroad Company, do not constitute an interurban electric railway. 214 I. C. C. 707. * * *

(pp. 182-183) "We have held that the determination of the Commission is not an '*order*' reviewable under the Urgent Deficiencies Act of October 22, 1913. *Shannahan v. United States, supra.* * * *"

In *Canadian River Gas Company v. Federal Power Commission*, 110 F. (2d) 350 (1940) (C. C. A. 10) (Phillips, Circuit Judge), the Circuit Court of Appeals for the Tenth Circuit held that a mere finding by the Federal Power Commission that the Canadian River Gas Company is a natural gas company within the meaning of the Natural Gas Act, is not reviewable under Section 19(b) of the Act, even though the finding was accompanied by a preliminary, interlocutory, and interim order. The court said at page 352:

"Sec. 717r (b) provides that any party to a proceeding under the Natural Gas Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the natural gas company to which the order relates is located or has its principal place of business, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part.

"It will be observed that the order of March 14, 1939, finds that the companies are natural gas companies within the meaning of the Natural Gas Act, and that it is necessary and proper, in the public interest, and to aid in the enforcement of the Natural Gas Act, that an investigation be instituted by the Commission, on its own motion, into and concerning rates, charges, classifications, rules, regulations, practices, and contracts of such companies, and orders that an investigation of such companies 'be and is hereby instituted.'

"It is in no proper sense a definitive order. Rather, it is a mere step in procedure. It neither commands nor inhibits any action on the part of the companies.

Furthermore, no orders theretofore made by the Commission respecting the companies remained unexecuted. They had fully complied with general orders Nos. 51 and 53."

In denying the rehearing on its order of dismissal, the Circuit Court of Appeals for the Tenth Circuit further said in *Canadian River Gas Company v. Federal Power Commission*, 113 F. (2d) 1010 (C. C. A. 10) (1940) (Phillips, Circuit Judge), at pages 1012-1013:

"It is true that order No. 51 of the Commission directed an investigation to determine what persons are natural gas companies within the meaning of the Natural Gas Act and it is urged that the finding in the order of March 14, 1939, was the culmination of that proceeding and in effect commands obedience by the companies with the provisions of the Natural Gas Act. We do not so regard the finding sought to be reviewed. It was made in the order of March 14, 1939, ordering an investigation. It was nothing more than a preliminary finding in a proceeding in which a definitive order has not yet been entered. As stated in our former opinion, 110 F. 2d 350, 352, 'It is a mere step in procedure. It neither commands nor inhibits any action on the part of the companies.'

"Counsel for the companies urge that the question of jurisdiction by virtue of the challenged finding will become *res judicata* and that they will be estopped from challenging the Commission's jurisdiction in any proceeding to review a future order of the Commission. The attitude taken by the Commission in this proceeding and our decision precludes that eventuality."

To the same effect is *New York State Natural Gas Company v. Federal Power Commission* (C. C. A. 2nd, October 26, 1939, unreported), where it was held that a mere finding of the Federal Power Commission that the New York State Natural Gas Company is a "natural gas company" within the meaning of the Natural Gas Act, is

not reviewable under Section 19(b) of the Act, even though accompanied by an interim, procedural and interlocutory order. The decision of the Circuit Court of Appeals for the Second Circuit, sustaining the Federal Power Commission's motion to dismiss follows:

> "Petition for review dismissed on the authority *Federal Power Commission v. Metropolitan Edison Company*, 304 U. S. 375, and *Rochester Telephone Company v. United States*, 307 U. S. 125."

Again, in *East Ohio Gas Company v. Federal Power Commission*, 115 F. (2d) 385 (1940) (C. C. A. 6th) (Simons, Circuit Judge), the Circuit Court of Appeals for the Sixth Circuit held that a mere determination of the Federal Power Commission that The East Ohio Gas Company is a natural gas company within the meaning of the Natural Gas Act, is not reviewable under Section 19(b) of the Act, even though the determination is accompanied by a preliminary, procedural, and interlocutory order. The Court said at pages 388-389:

> "(3-5) The order here sought to be reviewed declares the status of the petitioner as a natural gas company, but such status does not necessarily or immediately carry a direction of obedience to any mandatory order applicable to all having such status. The petitioner seeks to bring itself within the rationalization of the Rochester decision (*Rochester Telephone Corporation v. United States*, 307 U. S. 125), by the contention that the Commission's order No. 51 becomes binding upon it by virtue of the Commission's determination of its status, and by the asserted inference that the Commission has under contemplation and will make other general orders applicable to all natural gas companies. But General Order No. 51 has already been complied with by the petitioner—it is no longer the subject of controversy—and mere expectation that other orders of the Commission may follow does not presently impose upon the petitioner any necessary or immediate mandate which, under the reasoning of the

Rochester case, makes determination of status reviewable. * * *"

In *Federal Power Commission v. Metropolitan Edison Company*, 304 U. S. 375 (1938) (Mr. Chief Justice Hughes), the Chief Justice said at page 385:

"* * * A final report by the Commission on value under sec. 19a of the Interstate Commerce Act, though called an order, is not reviewable. *United States v. Los Angeles & Salt Lake R. Co.*, *supra*. Compare *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522, 527; *Great Northern Ry. Co. v. United States*, 277 U. S. 172, 181, 182; *United States v. Griffin*, 303 U. S. 226; *Shannahan v. United States*, 303 U. S. 596. * * *"

In the leading case of *United States v. Los Angeles and Salt Lake Railroad Company*, 273 U. S. 299 (1927) (Mr. Justice Brandeis), Mr. Justice Brandeis, speaking for the court, pointed out that a finding of valuation by the Interstate Commerce Commission, even though called an order, is not reviewable merely because it may be prima facie evidence of the facts found in some other proceeding before a court or commission. Mr. Justice Brandeis said at pages 309-312:

"The so-called order here complained of, is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. Compare *Smith v. Interstate Commerce Commission*, 245 U. S. 33. Moreover, the investigation made was not a step in a pending proceeding in which an order of the character of those hereto

be judicially reviewable could be entered later. It was merely preparation for possible action in some proceeding which may be instituted in the future—preparation deemed by Congress necessary to enable the Commission to perform adequately its duties, if and when occasion for action shall arise. The final report may, of course, become a basis for action by the Commission, as it may become a basis for action by Congress or by the legislature or an administrative board of a State. But so may any report of an investigation, whether made by a committee of Congress or by the Commission pursuant to a resolution of Congress or of either branch thereof.

"The Valuation Act requires that the investigation and study be made of the properties of each of the rail carriers. There are about 1800. 40 Annual Report Interstate Commerce Commission, 13. In directing the Commission to investigate the value of the property of the several carriers, Congress prescribed in detail the subjects on which findings should be made, and constituted the 'final valuations' and 'the classification thereof' *prima facie* evidence, in controversies under the Act to Regulate Commerce. Every party in interest is, therefore, entitled to have and to use this evidence; and the carrier, being a party in interest, has the remedy by mandamus to compel the Commission to make a finding on each of the subjects specifically prescribed. *Kansas City Southern Ry. Co. v. Interstate Commerce Commission*, 252 U. S. 178. But Congress did not confer upon the courts power either to direct what this 'tribunal appointed by law and informed by experience,' *Illinois Central Ry. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454, shall find, or to annul the report, because of errors committed in making it. Moreover, errors may be made in the final valuation of the property of each of the nearly 1800 carriers. And it is at least possible that no proceeding will ever be instituted, either before the Commission or a court, in which the matters now complained of will be involved or in which the errors alleged will be of legal significance.

"The mere fact that Congress has, in terms, made 'all final valuations * * * and the classification thereof * * * *prima facie* evidence of the value of the property in all proceedings under the Act to Regulate Commerce * * * in all judicial proceedings for the enforcement of the Act * * * and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission" is, obviously, not a violation of the due process clause justifying proceedings to annul the order. That to make the Commission's conclusions *prima facie* evidence in judicial proceedings is not a denial of due process, was settled by *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 412, 430, 431. It was there said of a like provision relating to reparation orders: 'This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence.' See also *Mills v. Lehigh Valley R. R. Co.*, 238 U. S. 473, 481-482; *St. Louis Southwestern Ry. Co. v. United States*, 264 U. S. 64, 77.

"Nor does the fact that 'all final valuations * * * and the classifications thereof' are made *prima facie* evidence prevent the report from being solely an exercise of the function of investigation. Data collected by the Commission as a part of its function of investigation, constitute ordinarily evidence sufficient to support an order, if the data are duly made part of the record in the case in which the order is entered. See *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93; *Chicago Junction Case*, 264 U. S. 258, 262; *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 286-290; Act of June 18, 1910, c. 309, sec. 13, 36 Stat. 539, 555. Inquests and inquisitions, if they were expressly authorized, are, at common law, admissible in evidence in judicial proceedings, thus constituting an exception to both the hearsay rule and the rule against opinion evidence. 3 *Wigmore on Evidence* (2d ed.), secs. 1671-1674. Some inquests are at common law also *prima facie* evidence of the facts found. *Hughes v. Jones*, 116 N. Y. 67."

Assuming arguendo that the Federal Power Commission's findings as to lawfulness of past rates are binding upon the parties and privies to the Hope case in another proceeding before some court or commission, unless unsupported by evidence or otherwise unlawful, they are nevertheless not an order and not reviewable here or now. The Supreme Court has held that the mere fact that findings by the Interstate Commerce Commission are binding in another proceeding between the same parties before the Railway Mediation Board where they are subject to challenge only upon the ground that they are not supported by substantial evidence, does not make them an "order" subject to immediate judicial review. *Shields v. Utah Idaho Central Railroad Company*, 305 U. S. 177 (1938), *supra*; *Shannahan v. United States*, 303 U. S. 596, *supra*.

In the recent case of *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401 (1940) (Mr. Justice Stone), the Supreme Court held that a certification by the National Labor Relations Board that a particular labor organization of longshore workers is a collective bargaining representative of the employees in a designated unit, composed of numerous employers of longshore workers at Pacific Coast ports, was not reviewable as an "order" within the meaning of Section 10 (f) of the Wagner Act. Mr. Justice Stone, speaking for the Court, said at pages 408-412:

> "In analyzing the provisions of the statute in order to ascertain its true meaning, we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of 'orders.' See *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 130, 135, *et seq.*; *Federal Power Comm'n v. Pacific Power & Light Co.*, 307 U. S. 156. We must

look rather to the language of the statute, read in the light of its purpose and its legislative history, to ascertain whether the 'order' for which the review in court is provided, is contrasted with forms of administrative action differently described as a purposeful means of excluding them from the review provisions.

"Here it is evident that the entire structure of the Act emphasizes, for purposes of review, the distinction between an 'order' of the Board restraining an unfair labor practice and a certification in representation proceedings. The one authorized by § 10 may be reviewed by the court on petition of the Board for enforcement of the order, or of a person aggrieved, in conformity to the procedure laid down in § 10, which says nothing of certifications. The other, authorized by § 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice. The exclusion of representation proceedings from the review secured by the provisions of § 10 (f) is emphasized by the clauses of § 9 (d), which provide for certification by the Board of a record of a representation proceeding only in the case when there is a petition for review of an order of the Board restraining an unfair labor practice. The statute on its face, thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms.

* * * * *

"An argument, much pressed upon us, is, in effect, that Congress was mistaken in its judgment that the hearing before the Board in proceedings under § 9 (c), with review only when an order is made under § 10 (c) directing the employer to do something 'provides an appropriate safeguard and opportunity to be heard.' House Rep. p. 23, and that 'this provides a complete guarantee against arbitrary action by the Board,' Sen. Rep., p. 14. It seems to be thought that this failure to provide for a court review is productive of peculiar hardships, which were perhaps not foreseen in cases where the interests of rival unions are affected. But

these are arguments to be addressed to Congress and not the courts. The argument too that Congress has infringed due process by withholding from federal appellate courts a jurisdiction which they never possessed is similarly without force. *Shannahan v. United States*, 303 U. S. 596; see *In re National Labor Relations Board*, 304 U. S. 486, 495.

"The Board argues that the provisions of the Wagner Act, particularly § 9 (d), have foreclosed review of its challenged action by independent suit in the district court, such as was allowed under other acts providing for a limited court review in *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, and in *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U. S. 56; cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41. But that question is not presented for decision by the record before us. Its answer involves a determination whether the Wagner Act, in so far as it has given legally enforceable rights, has deprived the district courts of some portion of their original jurisdiction conferred by § 24 of the Judicial Code. It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record."

Even if the Federal Power Commission had stated in its findings that it expected petitioner to pay back to its affiliate The East Ohio Gas Company the $8,200,000 which the Commission found Hope had overcharged East Ohio during the past 3½ years, as it did not, the Federal Power Commission's findings would still not be an order and would still not be reviewable. In *United States v. Atlanta, Birmingham and Coast Railroad Company*, 282 U. S. 522 (1931) (Mr. Justice Brandeis), the United States Supreme Court held that a report of the Interstate Commerce Commission which contained the following statement was not

an order and was therefore not reviewable under the Urgent Deficiencies Act:

> "'Upon consideration of the record, as supplemented, we find and conclude that the amount to be included in the balance sheet statement of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87. The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report.'"

Mr. Justice Brandeis, speaking for the court, said at pages 527-528:

> "*First.* The jurisdiction conferred upon district courts under the Urgent Deficiencies Act is that formerly exercised by the Commerce Court over 'cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.' Act of June 18, 1910, c. 309, sec. 1, 36 Stat. 539. The action here complained of is not in form an order. It is a part of a report—an opinion as distinguished from a mandate. The distinction between a report and an order has been observed in the practice of the Commission ever since its organization—and for compelling reasons. Its functions are manifold in character. In some matters its duty is merely to investigate and to report facts. See *United States v. Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 310. In others, to make determinations. See *Great Northern Ry. Co. v. United States*, 277 U. S. 172. In some, it acts in an advisory capacity. Compare *Minneapolis & St. Louis R. Co. v. Peoria & Pekin Union Ry. Co.*, 270 U. S. 580, 584-5. In others in a supervisory. Even in the regulation of rates, as to which the Commission possesses mandatory power, it frequently seeks to secure the desired action without issuing a command. In such cases it customarily points out in its report what the carriers are expected to do. Such action is directory as distinguished from mandatory. No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review. * * *"

Finally, in *Great Northern Railway Company v. United States*, 277 U. S. 172 (1928) (Mr. Justice Brandeis), the opinion of the Supreme Court points out that a finding of the Interstate Commerce Commission contained in a certificate issued by the Commission to the Secretary of the Treasury under Sectio.. 209, Transportation Act, 1920, setting forth the amount required of the United States to make good to a railroad company its guaranty of operating income during the six months following the termination of federal control, and stating also the aggregate amount theretofore certified, and thus showing (in this case) an overpayment by the government, is not an order. Mr. Justice Brandeis said at page 180:

> "Transportation Act, 1920, did not confer upon the Commission power to order anything in connection with the issue of the certificates. There is in the certificates no direction, no word of command. They are the recital of a finding of fact. * * *"

It is respectfully submitted that the Federal Power Commission's "Findings as to Lawfulness of Past Rates" are not reviewable because they are what the Commission called them—mere findings.

B. The Federal Power Commission's "Findings as to Lawfulness of Past Rates" are not an "order."

In *Louisville Gas and Electric Company v. Federal Power Commission*, 129 F. (2d) 126 (C. C. A. 6, June 29, 1942), the Circuit Court of Appeals for the Sixth Circuit held that it had jurisdiction to review orders of the Federal Power Commission which determined the original cost of the petitioner's property and in connection therewith directed the petitioner to establish accounting records and to conform its books and records to the Commission's determination of original cost. But the Court there distinguished that case from the case of a mere finding. The Court said at p. 131:

> * * * "So here the direction of the commission that the licensee establish accounts showing a debit balance in its fixed capital assets was an affirmative, determinative order directing action, *was more than a mere finding*, and its mandate entails more than a mere preservation of evidence. Compare *East Ohio Gas Company v. Federal Power Commission*, 6 Cir., 115 F. (2d) 385."

There is no claim here that the Federal Power Commission's "Findings as to Lawfulness of Past Rates" impose any duty upon petitioner to obey any unexecuted, previously formulated mandatory orders of the Federal Power Commission. The case is therefore clearly distinguishable from *Rochester Telephone Corporation v. United States*, 307 U. S. 125. As Phillips, Circuit Judge, said in *Canadian River Gas Company v. Federal Power Commission*, 110 F. (2d) 350, 352-353 (1940) (C. C. A. 10th), *supra*:

> "We think the case is distinguishable from *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 59 S. Ct. 754, 764, 83 L. Ed. 1147. * * *
>
> "In the instant case, there were no unexecuted, previously formulated, mandatory orders, nor did the order of March 14, 1939, in itself direct or inhibit any action on the part of the companies. It can only adversely affect the rights of the Canadian Company and the Colorado Company on the contingency of future administrative action. * * *"

Nor is it claimed in this case that the Federal Power Commission's "Findings as to Lawfulness of Past Rates" impose any duty upon petitioner to obey any statutory regulations which interfere with its freedom of conduct, or that the Federal Power Commission's findings compel specific actions by the Company and prohibit other actions by it. The "findings" in the instant case determine no status. The case is therefore distinguishable from *Jersey Central Power and Light Company v. Federal Power Commission* (C. C. A. 3d) (May 25, 1942) (Biggs, Circuit Judge), 129 F. (2d) 183. In that case, the United States

Court of Appeals for the Third Circuit held a determination of the Federal Power Commission that Jersey Central was a public utility within the meaning of the Federal Power Act and that Jersey Power had acquired securities in violation of Section 203(a) of that act, reviewable as an "order." In holding the Federal Power Commission's determination reviewable under the *Rochester* case, 307 U. S. 125, *supra*, Biggs, Circuit Judge, said (p. 191):

> • • • "The 'Determination by the Commission' at bar is analogous to the orders in the second group described by Mr. Justice Frankfurter, orders imposing statutory obligations and prohibitions and it should follow that this court has jurisdiction to review the action of the Federal Power Commission which makes Jersey Central subject not only to statutory regulations which interfere with its freedom of conduct but compel specific actions by the Company and prohibit other actions by it."

Finally, these "findings" are wholly unlike an order promulgating general legislative rules and regulations having the force of law which require the Commission to refuse a corporation renewal of a license if it does not comply with the rules and regulations, thereby putting the party under duress to take immediate action. Cf. *Columbia Broadcasting System, Inc. v. United States*, . . . U. S. . . . , 86 L. Ed. (Advanced Opinion) 1066, 62 S. Ct. 1194 (June 1, 1942) (Mr. Chief Justice Stone) (Justices Frankfurter, Douglas and Reed, dissenting). In that case, where the Supreme Court held the order reviewable, Mr. Chief Justice Stone said at pages 1203-1204 of the Supreme Court Reporter:

> "We need not stop to discuss here the great variety of administrative rulings which, unlike this one, are not reviewable—either because they do not adjudicate rights or declare them legislatively, or because there are adequate administrative remedies which must be pursued before resorting to judicial remedies; or, be-

cause there is no occasion to resort to equitable remedies." * * *

We also respectfully call the attention of the Court to the following language in the dissenting opinion of Mr. Justice Frankfurter in the *Columbia Broadcasting* case (62 S. Ct. 1206, 1213-1214) which, apart from the moot question whether it stated the law upon the facts of that case, is clearly applicable here:

> "The criteria governing judicial review of 'orders' under the Urgent Deficiencies Act were defined by a unanimous Court in *United States v. Los Angeles & S. L. R. R.*, 273 U. S. 299, 309, 310, 47 S. Ct. 413, 414, 71 L. Ed. 651: 'The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation.' If 'broadcasting company' were substituted for 'carrier,' this analysis of the legal consequences of the action of the Interstate Commerce Commission in the *Los Angeles* case would fit perfectly the legal consequences of the action of the Federal Communications Commission in making public the challenged regulations.
>
> "The fact that an action of an administrative agency occasions even irreparable loss does not in itself afford sufficient grounds for judicial review. Even if the Commission committed a wrong, the question of judicial reviewability still remains that put in the *Los Angeles* case, 273 U. S. at page 313, 47 S. Ct. page 416, 71 L. Ed. 651, to wit, it is 'a wrong for which Congress provides a remedy under the Urgent Deficiencies Act' of October 22, 1913, 38 Stat. 208, 219, 28 U. S. C. A. § 47, as incorporated in § 402 (a) of the Communications Act of 1934, 47 U. S. C. A. § 402 (a).
>
> "For Congress has not authorized resort to the federal courts merely because someone feels aggrieved.

however deeply, by an action of the Federal Communications Commission. A District Court of the United States can take a case only when Congress has authorized that type of case to be taken. Congress did not leave opportunity for reviewing damaging action by the Federal Communications Commission to the general equity powers of the district courts. It circumscribed the power of the courts in relation to the Commission in the most detailed way. Its incorporation by reference, in the Communications Act of 1934, 47 U. S. C. A. § 151 *et seq.*, of the scope of review allowed in reviewing an 'order' of the Interstate Commerce Commission gave all the precise, definite, and technical boundaries which the concept of a reviewable 'order' had acquired through the decisions of this Court prior to the enactment of the Communications Act. The precise requirements of an 'order' of the Commission for purposes of judicial review are therefore as inflexible as though they were written into the Act itself.

* * *

"Hardship there may well come through action of an administrative agency. But to slide from recognition of a hardship to assertion of jurisdiction is once more to assume that only the courts are the guardians of the rights and liberties of the people. In denying that it had power to review the action of the Federal Communications Commission because that body had not yet determined a legal right, the court below, as Judge Learned Hand's opinion abundantly proves, was not respecting a rule of etiquette. On the contrary, it merely recognized that the federal courts are entrusted with the correction of administrative errors or wrongdoing only to the extent of Congressional authorization. To say that the courts should reject the doctrine of administrative finality and take jurisdiction whenever action of an administrative agency may seriously affect substantial business interests, regardless of how intermediate or incomplete the action may be, is, in effect, to imply that the protection of legal interests is entrusted solely to the courts. The unbroken current of this Court's decisions, in con-

struing the scope of judicial review under the Urgent Deficiencies Act, and which is the only warrant for jurisdiction in this case, repels such a conclusion. The decision should therefore be affirmed."

It is respectfully submitted that the Federal Power Commission's "Findings as to Lawfulness of Past Rates" are not reviewable here because they are not an "order."

CONCLUSION.

Since, the "Findings as to Lawfulness of Past Rates" entered by respondent, Federal Power Commission, on May 26, 1942, do not constitute an "order" within the meaning of Section 19(b) of the Natural Gas Act; and

Since, Congress has authorized this Honorable Court to review only an "order" of the Federal Power Commission, and has not authorized the review of mere "findings" of the Commission;

Therefore, it is respectfully submitted that the motion of respondent, City of Cleveland, to dismiss Part B of the Petition for Review should be granted.

Respectfully submitted,

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